The Advocate

Journal of Criminal Justice Education & Research
Kentucky Department of Public Advocacy

Volume 26, Issue No. 4 July 2004

THE DEPARTMENT OF PUBLIC ADVOCACY MOVES TO THE JUSTICE AND PUBLIC SAFETY CABINET

Lt. Governor Steve Pence and Public Advocate Ernie Lewis

DPA HAS TWO NEW PUBLIC ADVOCACY COMMISSION MEMBERS

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Ken Schwendeman

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Ky DPA's Journal of Criminal Justice Education and Research

The Advocate provides education and research for persons serving indigent clients in order to improve client representation and insure fair process and reliable results for those whose life or liberty is at risk. It educates criminal justice professionals and the public on defender work, mission and values.

The Advocate is a bi-monthly (January, March, May, July, September, November) publication of the Department of Public Advocacy, an independent agency within the Justice & Public Safety Cabinet. Opinions expressed in articles are those of the authors and do not necessarily represent the views of DPA. *The Advocate* welcomes correspondence on subjects covered by it. If you have an article our readers will find of interest, type a short outline or general description and send it to the Editor.

Department of Public Advocacy
Education & Development
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40601
Tel: (502) 564-8006, ext. 294
Fax: (502) 564-7890
E-mail: Lisa.Blevins@ky.gov

Paid for by State Funds. KRS 57.375

FROM THE EDITOR...

Jeff Sherr

New Editor. Just as Ed Monahan created one of the premier public defender training programs, he also built a flagship state public defender journal. It has been my fortune to work closely with Ed for more than four years as the DPA's Education and Strategic Planning Branch Manager. I ask for your assistance and patience as I attempt to maintain the high quality of this journal. If you have any story ideas or spot any errors please feel free to contact me.

Move to Justice Cabinet. The DPA has now moved from the Environmental and Public Protection Cabinet to the Justice and Public Safety Cabinet. Public Advocate Ernie Lewis gives details of the move.

Death Penalty Representation Standards. In February 2003, the American Bar Association released the revised Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. Shortly after, the Department of Public Advocacy adopted these guidelines. In this article, Robin M. Maher, the Director of the American Bar Association's Death Penalty Representation Project, explores the impact of these guidelines on the United States Supreme Court case, *Wiggins v. Smith*, and other federal and state capital post conviction cases.

Jail Fees. Bryan Underwood explores the Constitutionality of Kentucky's jail fee system.

New Legislation. This month many new laws go into effect. Kentucky Association of Criminal Defense Lawyers' Robert Lotz gives an overview of this legislation as well as information regarding bills which did not pass.

Instant Prelims: Manufacturing Meth. B. Scott West provides another in a his series of preliminary hearing nuts and bolts with this article on conducting the preliminary hearing for a client charged with the Class B Felony of Manufacturing Methamphetamine.

Powerful Opening Statements. Mark Stanziano, frequent coach at DPA's Litigation Persuasion Institute, offers a primer on the art of the Opening.

Parole Statistics. Post Conviction paralegal, Bob Hubbard explores the meaning of the 2002 to 2003 parole board statistics.

Jeff Sherr
Education and Strategic Planning Branch Manager

THE DEPARTMENT OF PUBLIC ADVOCACY MOVES TO THE JUSTICE AND PUBLIC SAFETY CABINET

by Ernie Lewis, Public Advocate

As of July 9, 2004, the Department of Public Advocacy was moved into the Justice and Public Safety Cabinet (hereinafter Justice Cabinet). The Justice Cabinet also houses the Kentucky State Police, the Department of Juvenile Justice, the Department of Corrections, the Department of Vehicle Enforcement, the Office of the Chief Medical Examiner, the Office of Drug Control Policy, and the Kentucky Parole Board, among other agencies. This marks a return to the Justice Cabinet, where DPA was located from its inception until 1982. It was at that time that the Department was moved into the Public Protection and Regulation Cabinet, with the ostensible reasons being the existence of conflicts of interest.

Conflicts of interest were found to exist within the Public Protection and Regulation Cabinet as well. In that umbrella Cabinet existed Alcohol Beverage Control, the Fire Marshall, and the Crime Victim's Compensation Board. Potential conflicts were generally identified and managed. Those conflicts grew a bit when the Department moved into the Environmental and Public Protection Cabinet in December 2003. At that time, DPA was downgraded to the Office of Public Advocacy and placed into the Department for Public Protection. Additional conflicts grew from other quasi-law enforcement agencies within the larger Cabinet. Again, those conflicts of interest were not intractable.

From a theoretical viewpoint, conflicts of interest are inherent when the public defender function is placed into the Executive Branch. After all, the Executive Branch arrests individual, charges him or her with a crime and once convicted incarcerates that person, and thereafter paroles and monitors him while on parole. For that reason, the minority of states places the public defender function into the Judicial Branch. However, a placement there does not eliminate the inherent conflicts of interest. Again, the key is the identification and management of the conflicts of interest by criminal justice professionals.

Independence of the Indigent Defense Function is the Key

Wherever the public defender's office is placed in government, the most crucial component of the system of indigent defense system is the guarantee of institutional independence. The *ABA Standards for Criminal Justice, Providing Defense Services* (3rd Ed. 1992), Standard 5-1.3(a) requires the system to protect the integrity of the attorney/client relationship. "The legal representation plan for a jurisdiction should be designed to guarantee the integrity of the relationship between lawyer and client…[t]he [public defender] plan and the lawyers serving under it should be free from political influence." "[I]t is the constitutional obligation of the State to respect the professional independence of the public defenders whom it engages." *Polk County v. Dodson*, 454 U.S. 312, 321-322 (1981).

Lt. Governor & Secretary, Justice Cabinet, Stephen B. Pence

The *ABA Ten Principles of a Public Defense Delivery System* (February 2002) lists as principle #1 the following: "The public defense function, including the selection, funding, and payment of defense counsel, is independent." The commentary to that principle elaborates as follows: "The public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel. To safeguard independence and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems. Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense. The selection of the chief defender and staff should be made on the basis of merit…."

The *ABA Standards for Criminal Justice, Providing Defense Services* (3rd Ed. 1992), Standard 5-1.3(b) offers a structural way to insure the independence that protects the integrity of the attorney/client relationship, "An effective means of securing professional independence for defender organizations is to place responsibility for governance in a board of trustees."

Placement in the Justice Cabinet Can Guarantee Independence

So why return to the Justice Cabinet after leaving it 22 years ago due to conflicts of interest? I believe that the placement of DPA into the Justice Cabinet can work, and work to the benefit of the entire criminal justice system as well as to enhance the indigent defense function in Kentucky. I say this not underestimating the potentials for conflicts of interest. However, there are indications that this time this should work differently, and better, than it did before.

- The Office of Public Advocacy will return to being a Department under the Justice Cabinet. While this might appear to some as semantics, I can fairly say that restoring OPA to departmental status appears to reflect the belief that DPA has a significant and separate function to play in the criminal justice system.
- DPA will continue to be an "independent state agency attached for administrative purposes" to the Justice and Public Safety Cabinet. This small phrase is at the heart of ensuring DPA's independence. DPA must be placed somewhere, and it must be independent. By placing DPA as an independent state agency in the Justice Cabinet, DPA both is given an administrative home and guaranteed its independence at the same time.
- One crucial change since 1982 has been the creation of the Public Advocacy Commission. This 12 member nonpartisan board has as one of its duties ensuring the independence of DPA. In addition, the Commission is responsible for nominating those persons to be considered by the Governor in appointing a Public Advocate. The Commission also has the responsibility for supervising the Public Advocate as well as oversight of the public advocacy system.
- DPA will retain its own General Counsel. This is a clear indication that the Justice Cabinet is sensitive to the conflict of interest that would exist were the general counsel function be performed at the Cabinet level.
- There will be an effort to identify conflicts of interest and how the Justice Cabinet and DPA will work to manage those. This will be accomplished through the development of a protocol or a memorandum of agreement.

There are Potential Significant Benefits to DPA Being in the Justice Cabinet

DPA stands to gain by this reorganization. By being placed in the Justice Cabinet, DPA joins most of the other significant parts of the criminal justice system. The Justice Cabinet is run by lawyers who understand the criminal justice system and appreciate the role of public defenders in a fair and reliable system.

There are gains to be made from a funding perspective as well. The Justice Cabinet is aware of the trends in the criminal justice system. Funding often follows those trends, whether it be the need for increased prison beds, increased treatment facilities for juveniles or persons with substance abuse addiction, or the need for increased numbers of prosecutors due to an increase in the numbers of arrests. The Justice and the Judiciary Budget Review Subcommittee of the House Appropriations and Revenue Committee will be the committee where DPA's budget will begin. This is a committee that follows criminal justice trends and is aware of funding needs. This too should create the potential for a superior budget process.

I am overall enthusiastic about the possibilities inherent in the move to the Justice Cabinet. Only time will tell whether the gains are realized and whether the conflicts are identified and managed. I personally believe that both will occur with the attention of the criminal justice professionals now involved in this process. ■

DPA Annual Conference Award Winners

Margaret Case receiving the Gideon Award from Ernie Lewis

Diana Queen receiving the Rosa Parks Award from Ernie Lewis

DPA's Proposed Amendment to RCR 3.05 Cautioning of Accused; Appointment of Counsel

(1) At the time of the defendant's appearance the judge shall ***individually*** inform the defendant of the charge against him or her and of his or her right to a preliminary hearing or a trial, and shall ***individually*** advise the defendant of his or her right to have counsel. The defendant shall be informed also that he or she is not required to make a statement and that any statement made by him or her may be used against him or her. The judge shall notify the attorney for the Commonwealth, allow the defendant reasonable time and opportunity to consult counsel, and release the defendant on personal recognizance or admit the defendant to bail if the offense is bailable.

(2) If the crime of which the defendant is charged is punishable by confinement and the defendant is financially unable to employ counsel, the judge shall appoint counsel to represent the defendant unless he or she elects to proceed without counsel. The defendant has the burden of first establishing his or her indigency before counsel may be appointed. If the defendant demonstrates that he or she is a needy person as defined in KRS 31.120 and the court so concludes, then the appointment shall continue for all future stages of the criminal proceeding, including appeal. Such appointment may be terminated by the court in which the proceeding is pending at any time upon a showing that defendant is able to employ counsel.

(3) If the defendant is indigent pursuant to KRS Chapter 31, any waiver of appointment of counsel shall occur only after an individualized colloquy with the court, and only after the court is assured that the defendant is fully informed regarding his right to counsel and the consequences of his waiver. The failure to request counsel shall not be considered waiver of counsel.

KY Supreme Court Considering Amendments To Rule Regarding Waiver Of Counsel

Comments from Public Advocate Ernie Lewis

The amendments to RCr 3.05 are consistent with the AOC/DPA Workgroup Recommendations. The proposed rule should be understood in the context of the AOC/DPA Workgroup that issued a report in 2002. This workgroup consisted of leaders from AOC and DPA as well as six experienced district judges. The judges included persons representing urban as well as rural jurisdictions and jurisdictions from all geographic areas of the Commonwealth. The membership included: Cicely Lambert, Melinda Wheeler, Ed Crockett, Mike Losavio, Jacquie Heyman, Judge George David, Judge Mike Collins, Judge Carl Hurst, Judge Bruce Petrie, Judge John Knox Mills, Judge William R. Ryan (Judge Deborah DeWeese in his absence), myself, Judy Campbell, Ed Monahan, Jim Cox, Lynda Campbell, Scott West, Rob Sexton, Joseph Barbieri, Dan Goyette, and George Sornberger.

The Workgroup spent many of its five meetings discussing the process used in the appointment of counsel to persons who are indigent. We discussed barriers that were making the appointment decision either less reliable or more inaccurate. The Workgroup found that the "time immediately after the arrest until he or she appears in front of a magistrate is a particularly important time to ensure that a variety of safeguards are taken." (Finding #2). The Workgroup found that so long as KRS 31.140 is followed, there was no problem with waivers of counsel. It was soon recognized that one potential problem area occurred when judges advised groups of individuals of their rights to counsel. "When advising accused persons in a group setting, the Court should thereafter individually inquire of each defendant whether counsel is desired." (Finding #7).

The judge should question the accused individually rather than in a group setting. Two recommendations were made by the Workgroup that are especially supportive of the proposed amendments to RCr 3.05. First, the Workgroup recommended that any questioning occur individually rather than in a group. "Individual rather than group questioning by the judge of the person at the first appearance should resolve the issue of whether the person is going to hire a private attorney, desires to have counsel appointed, is eligible to have counsel appointed, or desires to waive the appointment of counsel." (Eligibility Recommendation #2). The amendment to RCr 3.05(1) adding "individually" is consistent with this recommendation.

Waivers should only occur during an individual conversation between the judge and the accused. The Workgroup also recommended that waivers also occur individually and explicitly.

The Workgroup recommended that "[w]aiver of counsel should occur only after an individualized colloquy with the court, and only after the court is assured that the defendant is fully informed regarding his right to counsel and the consequences of his waiver." (Eligibility Recommendation #8 in part). Adding subsection 3 to RCr 3.05 is consistent with this recommendation. "If the defendant is indigent pursuant to KRS Chapter 31, any waiver of appointment of counsel shall occur only after an individualized colloquy with the court, and only after the court is assured that the defendant is fully informed regarding his or her right to counsel and the consequences of waiver."

A waiver of the right to counsel should not be inferred from silence. RCr 3.05(3) also states that the "failure to request counsel shall not be considered waiver of counsel." This is consistent with AOC/DPA Workgroup Recommendation #8, which reads that the "failure to request counsel should not be considered to be a waiver."

The proposed amendment is supported by the *ABA Standards for Criminal Justice Providing Defense Services*, 3rd Edition, Standard 5-8.2 (1990). It reads that the "accused's failure to request counsel…should not of itself be construed to constitute a waiver of counsel in court. An accused should not be deemed to have waived the assistance of counsel until the entire process of offering counsel has been completed before a judge and a thorough inquiry into the accused's comprehension of the offer and capacity to make the choice intelligently and understandingly has been made. No waiver of counsel should occur unless the accused understands the right and knowingly and intelligently relinquishes it. No waiver should be found to have been made where it appears that the accused is unable to make an intelligent and understanding choice because of mental condition, age, education, experience, the nature or complexity of the case, or other factors…"

There are significant public policy reasons why these amendments should be adopted. The amendments to RCr 3.05 would improve the system of criminal justice in Kentucky. It is well accepted that one of the essential elements of fairness in our system is having an attorney representing the parties in court. For the poor man or woman facing a loss of liberty, the provision of counsel is one of the critical stages of the proceedings. If for any reason, that poor man or woman is unable to participate meaningfully at that stage when the provision of counsel is being determined, then the provision of counsel, and indeed the fairness of the proceedings, will be lost.

Unfortunately, that stage when counsel is appointed is often one that is not structured to ensure that the accused understands what is happening to them. This occurs often during those hours following arrest, when the accused might still be drunk, hungover, high, mentally ill, mentally retarded, or in shock. Often this occurs over a video, with the judge in another setting than the accused, who might be in a holding cell of some sort. If the proceeding occurs in court, it often occurs in a crowded courtroom, and the accused might be inattentive, unable to hear, or tending to a child or other family member. It is in this context that a group warning is the most problematic. A judge advising persons of their rights in these contexts cannot be assured that the accused persons have heard their rights advisory, much less understood them.

Further, it is imperative that if counsel is going to be waived, that waiver must be done explicitly in an individualized conversation with a judge. If the person is drunk, or hung over, or did not hear the advisory, nothing should be assumed from silence. Certainly in this setting silence does not equate to a waiver.

The Commonwealth has nothing to lose from the proposed amendment, and much to gain. Citizens must know what their rights are before those rights are waived. It is important for citizens to have confidence in their government. It is important for government not to overreach by assuming a waiver of rights from silence. Furthermore, waivers made during individualized colloquies can be relied upon, and will likely not be open to question later. Waivers made as a result of a group advisory followed by the failure to request counsel cannot be relied upon for a waiver of a fundamental constitutional right.

The proposed rule does not apply to police interrogations. One argument raised at the June 23, 2004 Kentucky Supreme Court Rules Hearing was that the proposed rule somehow might effect procedures used by the police when questioning suspects. However, the proposed amendment to RCr 3.05 explicitly applies by its very terms to a defendant appearing before a judge. Nothing in either the present RCr 3.05, or the proposed amendments, applies outside of the courtroom, and certainly not to the procedures used by the police during interrogation.

Accommodation must be made to ensure constitutional rights are preserved. Another argument raised by a rural district judge was that his docket was too extensive to be able to afford the protections of the proposed amendments to RCr 3.05. Certainly, requiring individualized questioning of accused defendants, and further requiring individualized waivers, will require a bit more time than is presently devoted to this critical stage. However, constitutional rights are not guaranteed us only when convenient, or only when the state can afford to provide the right.

The AOC/DPA Workgroup had on its body 6 district judges from busy jurisdictions, jurisdictions from rural and urban areas from all over the Commonwealth. The judges unanimously agreed on the recommendations of the Workgroup. The views of one district judge should not be sufficient to outweigh that which was expressed by this Workgroup that deliberated over 5 meetings with significant input from district judges.

This proposed Rule change is now under submission to the Kentucky Supreme Court Justices. Hopefully, the Court will adopt it. ■

USING THE ABA GUIDELINES TO ASSESS PERFORMANCE OF DEFENSE COUNSEL

by Robin M. Maher

Three years ago the American Bar Association embarked on a multi-year process to identify and define the essential aspects in the defense of a capital case. The endeavor was prompted by profound concerns about the state of indigent capital defense. Case after case told the story of unskilled or inexperienced lawyers, without necessary resources, failing to provide their clients with the effective defense they deserved and were constitutionally entitled to receive. Our criminal justice system had become a liability for poor people facing the death penalty because the defense effort was so inadequate. Articulating a national standard of care was a necessary first step if meaningful reform was to occur.

The ABA approved revised Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (hereinafter "Guidelines") in February 2003.[1] The Guidelines "are not aspirational" but embody "the current consensus about what is required to provide an effective defense representation in capital cases."[2] The President of the ABA has called for all death penalty jurisdictions to adopt the Guidelines as a way of bringing about the kind of systemic reform that is urgently needed.

Standards are Essential for Professionalism

I have believed in the importance of standards since becoming Public Advocate. Both the NLADA and the ABA have pioneered the development of standards applicable to both trial practice and the more specialized practice of capital cases. Embedding standards into our agency are essential to our becoming a professional and excellent organization. The Department of Public Advocacy recognizes the significance of the ABA Guidelines. The Guidelines have been adopted for all attorneys representing Kentucky's indigent accused of a capital offense, both those represented by DPA attorneys and those represented by attorneys on contract with the DPA. In addition, the Department is providing training on the guidelines and the skills needed to meet the guidelines through regional events, our annual seminar and our litigation institute.

Ernie Lewis, Public Advocate

In the same year that the Guidelines were approved, the Supreme Court took up the case of Kevin Wiggins, a Maryland death row prisoner. *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527 (2003). In assessing the reasonableness of defense counsel's performance, the Court turned to the Guidelines' "well defined norms" for guidance. *Id.*,123 S.Ct. at 2537. The difference between what the Guidelines required for effective representation and what Mr. Wiggins' counsel had done was stark. The Court found that the defense effort "fell short of the standards for capital defense work articulated by the American Bar Association (ABA) – standards to which we have long referred as 'guides to determining what is reasonable.'" *Id.* at 2537 (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)). A new sentencing hearing was ordered after the Court held that trial counsel's failure to fully investigate Wiggins' background in the manner and depth described by the Guidelines constituted ineffective assistance of counsel.

The decision established the authority and relevance of the ABA Guidelines to all capital cases and marked only the second time since *Strickland* that the Court has found defense counsel ineffective in a capital case.[3]

The lesson of *Wiggins* could not be clearer: defense counsel who fail to do what the ABA Guidelines require will be found ineffective. Defense counsel who hope to avoid such a finding must therefore demand the resources, time and expert assistance detailed in the Guidelines.

Importantly, using the Guidelines also advances the cause of justice. There is no better way to protect against the error and abuses that can lead to wrongful convictions and death sentences than to improve the quality of legal representation that criminal defendants receive. Our adversarial system depends on the quality of the defense effort matching that of the prosecution. Maintaining the imbalance that currently exists only invites more error, and will further undermine the public's confidence in the capital punishment system.

Because the Guidelines have become the expression and definition of "effective performance," they are also of essential use to members of the judiciary. Judges who make critical decisions about the resources and funding for the defense effort must now consider the consequences of refusing to provide necessary resources to defense counsel. The choice is increasingly becoming one of timing. A failure

to initially invest in the defense effort may mean later payment of those costs upon a reversal or remand of the case. This will also mean unnecessary expense to the jurisdiction and a duplication of efforts. A more costly price to pay will be one of injustice. These and other reasons merit following the approach the Guidelines mandate to "fund the full cost of quality legal representation."[4]

The following is a summary of the many courts that have followed the Supreme Court's example and used the Guidelines to guide their assessment of the defense effort and counsel performance.

Federal Courts

In *Allen v. Woodford*, 366 F.3d 823 (9th Cir. 2004), the 9th Circuit affirmed Allen's conviction and sentence. Although the court found that trial counsel's performance had been deficient during sentencing, it did not find that his deficient performance prejudiced the outcome of the trial and therefore denied relief.

Regarding the fact that second counsel was not sought, the court recognized that "the use of second counsel in defending capital cases is now recommended by the American Bar Association," but found that such a standard was not the prevailing norm at the time of Allen's trial in 1982. *Id.* at 842 (citation omitted).

The court looked to *Wiggins* when it assessed counsel's failure to adequately investigate and present mitigation evidence, and noted the relevant ABA Guidelines which provide that investigations into mitigating evidence 'should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'" *Id.* at 845 (citations omitted). The court found that counsel did not begin to prepare mitigation evidence until a week before trial, and that his performance failed to meet the prevailing norms for reasonable performance at the time of trial. For these reasons, the court held that "counsel's untimely, hasty, and incomplete investigation of potential mitigation evidence for the penalty phase fell outside the 'range of reasonable professional assistance.' *Strickland*, 466 U.S. at 689." *Id.* at 845.

In *Soffar v. Dretke*, 368 F.3d 441 (2004) (5th Cir. 2004), the 5th Circuit granted a new trial after finding that the defendant did not receive the effective assistance of counsel. The court concluded that trial counsels' failure to interview the only surviving witness to the crime, whose statements were inconsistent with the State's theory of the case, as well as their failure to pursue ballistics evidence that contradicted the State's theory, prejudiced the outcome of Soffar's trial. The court noted that because the Supreme Court has declined to articulate specific guidelines for effective assistance, attorney conduct must be evaluated according to prevailing professional norms – which, in the Supreme Court's opinion, are the ABA Guidelines. The 5th Circuit applied "the framework established in *Wiggins* for determining objective reasonableness" when it ordered a new trial. *Id.* at 478.

In *Cone v. Bell*, 359 F.3d 785 (6th Cir. 2004), the Sixth Circuit granted a new penalty phase proceeding to Cone on the grounds that one of the aggravating factors found by the jury, that the crime was "especially heinous, atrocious or cruel," was unconstitutionally vague. The majority found that Cone had not procedurally defaulted on his Eighth Amendment claim because the state supreme court implicitly ruled on it.

In his concurring opinion, Judge Merritt argued that even had Cone procedurally defaulted on the claim, his attorney's failure to raise the issue and preserve it for review constituted ineffective assistance of counsel. Judge Merritt highlighted trial counsel's failure to object to the aggravator despite a recent Supreme Court decision invalidating similar language and found support for his opinion in the Guidelines:

> This conclusion is further supported by the American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. As pointed out in *Strickland*, "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." 466 U.S. at 688, 104 S.Ct. 2052. American Bar Association standards are only "guides" and not "rules" for what constitutes ineffective assistance of counsel, *Id.*, but in this case the guidelines speak clearly:
>
> > One of the most fundamental duties of an attorney defending a capital case at trial is the preservation of any and all conceivable errors for each stage of appellate and post-conviction review. Failure to preserve an issue may result in the

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American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases

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> client being executed even though reversible error occurred at trial. For this reason, trial counsel in a death penalty case must be especially aware not only of strategies for winning at trial, but also of the heightened need to fully preserve all potential issues for later review.
>
> ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 91-92 (rev. ed.2003) (internal quotations omitted). In this case, not only did Cone's counsel fail to preserve "any and all" errors, he failed to preserve a claim based on binding Supreme Court precedent that was a sure winner as a matter of federal law and that, given the role of the "heinous, atrocious, and cruel" aggravator in the jury's deliberation of the death sentence, may well have saved his client's life. There can be no doubt that this error was "sufficiently egregious and prejudicial" to constitute cause for the procedural default of that claim. (359 F.3d at 803-804.)

Judge Merritt also pointed out that, although the 2003 edition of the Guidelines was not published at the time of Cone's trial, his citation to them was appropriate because they are "an articulation of long-established 'fundamental' duties of trial counsel." *Id.* at 804 n.2 (citations omitted).

In *Rompilla v. Horn*, 355 F.3d 233 (3d Cir. 2004), a three-judge panel of the Third Circuit overturned the district court's decision granting Rompilla a new penalty phase trial, which had been based in part on a finding that his trial counsel was ineffective during the sentencing phase. At issue was counsel's failure to adequately investigate and present evidence regarding Rompilla's family history and educational background, as well as his mental competence.

The majority insisted that the Guidelines are "only guides," and that counsel's failure to meet the standards set forth there does not necessarily indicate ineffective assistance under the standards articulated in *Strickland*. *Id.* at 259 n.14.

But in a strongly worded dissent, Judge Sloviter argued that *Wiggins* and *Williams* were both decided under the *Strickland* standard, and, therefore "these two later cases demonstrate how *Strickland* should be applied." *Id.* at 275. She noted that "[i]n *Wiggins*, the Supreme Court quoted from the American Bar Association's Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases . . ." regarding the investigation of mitigating evidence, and found that counsel's performance fell short of its "well-defined norms." *Id.* at 283 (citation omitted). Judge Sloviter considered the majority's "attempt to reconcile its conclusion that Rompilla's counsel provided effective assistance of counsel with the conclusion in *Wiggins* . . . nothing short of astonishing." *Id.*

Rompilla's petition for rehearing was denied by a closely divided court. 359 F.3d 310 (3d Cir. 2004). However, Judge Nygaard filed an opinion, joined by Judges Sloviter and McKee, agreeing with Judge Sloviter's earlier dissent. Judge Nygaard wrote:

> [t]he issue before us implicates the most fundamental and important of all rights - to be represented by effective counsel**. All other rights will turn to ashes in the hands of a person who is without effective, professional, and zealous representation when accused of a crime** (*emphasis added*). *Id.* at 310.

After giving examples of other capital cases in which "the range of what is deemed "effective" (by the courts) has widened to … an astonishing spectrum of shabby lawyering." *Id.* at 311. He continued:

> These disturbing examples of inept lawyering in capital cases have propelled professional organizations to act. The American Bar Association has promulgated "Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases." These Guidelines upgrade the minimum standard from "quality" legal representation to "high quality" legal representation. Included in those guidelines is the requirement that the capital defendant should "receive the assistance of all expert, investigative, and other ancillary professional services ... appropriate ... at all stages of the proceedings." Here, in my view, counsel's failure to conduct even the most rudimentary investigation into Rompilla's background falls short of being "effective" representation. I believe this level of representation violates not only the standards set out by the American Bar Association, but by accepting it as adequately effective, we continue to degrade the standard set out in *Strickland*, and ignore the sentiments expressed by Justice Sutherland in *Powell v. Alabama*. *Id.* at 311-312 (citation omitted).

In *Hamblin v. Mitchell*, 354 F.3d 482 (6th Cir. 2003), the Sixth Circuit granted a new penalty phase trial as the result of ineffective assistance of counsel. Defense counsel made no investigation into Hamblin's severely deprived and violent childhood or his psychological condition, and did nothing in preparation for the sentencing phase.

The court began its majority opinion with an analysis of the proper standard against which to measure counsel's performance. It looked to the Supreme Court's decision in *Wiggins*, noting that "[i]n its discussion of the 1989 ABA Guidelines for counsel in capital cases, the Court held that the Guidelines set the applicable standards of performance for counsel . . . . **Thus, the *Wiggins* case now stands for the proposition that the ABA standards for counsel in death penalty cases provide the guiding rules and standards to be used in defining the 'prevailing professional norms' in ineffective**

assistance cases" (*emphasis added*). *Id.* at 486 (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)).

The court went on to review several of its own prior decisions from the 1990s, concluding that "[o]ur analysis of counsel's obligations matches the standards of the 1989 Guidelines quoted by the Supreme Court in *Wiggins*." 354 F.3d at 486. Although Hamblin's trial took place before publication of the 1989 Guidelines, the court explained that they apply nonetheless:

> [T]he standards merely represent a codification of longstanding, common-sense principles of representation understood by diligent, competent counsel in death penalty cases. The ABA standards are not aspirational in the sense that they represent norms newly discovered after *Strickland.* They are the same type of longstanding norms referred to in *Strickland* in 1984 as "prevailing professional norms" as "guided" by "American Bar Association standards and the like." We see no reason to apply to counsel's performance here standards different from those adopted by the Supreme Court in *Wiggins* and consistently followed by our court in the past. The Court in *Wiggins* clearly holds . . . that it is not making "new law" on the effective assistance of counsel . . . ." *Id.* at 487 (citations omitted).

The court also noted that the "[n]ew ABA Guidelines adopted in 2003 simply explain in greater detail than the 1989 Guidelines the obligations of counsel to investigate mitigating evidence. The 2003 ABA Guidelines do not depart in principle or concept from *Strickland*, *Wiggins* or our court's previous cases concerning counsel's obligation to investigate mitigation circumstances." *Id.* at 487. The court then quoted extensively from the Guidelines regarding the duty to investigate mitigating evidence.

In concluding its discussion of the appropriate standards to use in evaluating counsel's performance, the court explained that "[w]e cite the 1989 and 2003 ABA Guidelines simply because they are the clearest exposition of counsel's duties at the penalty phase of a capital case, duties that were recognized by this court as applicable [in] 1982." *Id.* at 488. The court held that "[t]he record reveals that defense counsel's representation of Hamblin at the penalty stage of the case fell far short of prevailing standards of effective assistance of counsel as outlined in *Wiggins*, our previous cases and the 1989 and 2003 ABA Guidelines." *Id.* at 489. In its analysis, the court quoted from Guideline § 10.7, explaining that "ABA and judicial standards do not permit the courts to excuse counsel's failure to investigate or prepare because the defendant so requested." *Id.* at 492.

In *Bryan v. Mullin*, 335 F.3d 1207 (10th Cir. 2003), the 10th Circuit, sitting en banc, affirmed a three-judge panel's denial of habeas relief, and held that trial counsel's failure to present evidence regarding Bryan's mental health did not constitute ineffective assistance of counsel. The court found that although Bryan had organic brain disease brought on by severe diabetes, suffered from paranoid delusions, and had previously been adjudicated incompetent to stand trial, his counsel's decision not to introduce this evidence at trial or during sentencing was reasonable.

Judge Henry, joined by three other judges, wrote separately to disagree with the majority's determination that Bryan had received effective assistance of counsel. He took issue with the majority's repeated references to the fact that Bryan and his elderly parents objected to the presentation of evidence regarding Bryan's mental health. Judge Henry noted that "the Supreme Court has recently reiterated that the ABA Standards for Criminal Justice provide helpful benchmarks for 'determining what is reasonable'" and that "[t]he ABA Standards require counsel to inform the court of mitigating evidence." *Id.* at 1235 (citations omitted).

In his discussion of whether Bryan's counsel had properly explained the importance of mitigation evidence to the defendant and his family, Judge Henry cited to the Guidelines:

> The ABA's guidelines for capital defense work are "standards to which [the Supreme Court has] long referred to as "'guides to determining what is reasonable.'" *Wiggins*, 123 S.Ct. at 2537 (quoting *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052). For example, "[p]rior to the sentencing phase ... counsel should discuss with the client the specific sentencing phase procedures ... and advise the client of steps being taken in preparation for sentencing." ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases § 10.11(C) (2003). Similarly, [c]ounsel at every stage of the case should discuss with the client the content and purpose of the information concerning penalty that they intend to present to the sentencing or reviewing body..., means by which the mitigation presentation might be strengthened, and the strategy for meeting the prosecution's case in aggravation. *Id.* § 10.11(D). Furthermore, "[c]ounsel should consider, and discuss with the client, the possible consequences of having the client testify or make a statement to the sentencing ... body." *Id.* § 10.11(E).

Despite these "well-defined norms," *Wiggins*, 123 S.Ct. at 2536-37, however, it appears that counsel disregarded such responsibilities. 335 F.3d at 1238 n.6.

Judge Henry also dismissed the argument that trial counsel's decision not to present mitigating evidence was reasonable because such evidence was inconsistent with trial strategy. He cited to the commentary for Guideline 10.11, "whether or not the guilt phase defense will be that the defendant did not commit the crime, counsel must be prepared from the outset to make the transition to the penalty phase." *Id.* at 1238-1239 (citation omitted).

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State Courts

In *Armstrong v. Florida*, 862 So.2d 705 (Fla. 2003), the court ordered a new penalty phase proceeding as the result of the introduction of a vacated prior conviction. Judge Anstead wrote a concurring opinion focusing on Armstrong's claim of ineffective assistance of counsel during the penalty phase. He first reviewed the standards for the investigation of mitigation evidence set forth by the Supreme Court in *Wiggins* and then compared the performance of Armstrong's counsel with that of counsel in *Wiggins*:

> The 1989 ABA Guidelines that the Supreme Court concluded should have guided counsel's investigation in *Wiggins* should have provided similar guidance to Armstrong's counsel. These standards underscore not only the importance of defense counsel's investigation into mitigating factors, but also the understanding that often strategy shifts between the penalty and guilt phases of a capital trial. In general, preparation for both the penalty and guilt phases is essential, and counsel should be aware that "the sentencing phase of a death penalty trial is constitutionally different from sentencing proceedings in other criminal cases." 1989 ABA Guidelines 11.8.1, at 123. "If inconsistencies between the guilt/innocence and the penalty phase defenses arise, counsel should seek to minimize them by procedural or substantive tactics." 1989 ABA Guidelines 11.7.1(B), at 115. In conducting the investigation into those individuals who might present testimony at the penalty phase, counsel is required to seek out witnesses who are "familiar with aspects of the client's life history that might affect ... possible mitigating reasons for the offense(s), and/or mitigating evidence to show why the client should not be sentenced to death." *Id.* 11.4.1(D)(3)(B), at 95. 862 So.2d at 723.

He also cited to Guideline commentary, which explained the unique nature of sentencing proceedings in capital cases. Judge Anstead concluded that defense counsel's investigation into mitigation was inadequate because it failed to discover the quantity and detail the quality of evidence that actually existed.

In *New Jersey v. Savage*, 577 A.2d 455 (N.J. 1990), the New Jersey Supreme Court granted a new trial after finding that defense counsel was ineffective during both the guilt and penalty phases of trial. Savage's counsel met with him only once prior to trial, failed to conduct a pretrial investigation, did not evaluate Savage's mental condition despite indications that he suffered from severe mental illness, and presented almost no mitigation evidence.

The court looked to the 1989 Guidelines to inform its assessment of counsel's pretrial investigation. Regarding counsel's single meeting with Savage, the court noted that "[t]he American Bar Association Guidelines counsel that the initial step of any capital investigation is a personal consultation with the defendant. The Guidelines stress that such a meeting is necessary in order to explore other potential sources of information as well as the defendant's mental state." *Id.* at 619-620 (citation omitted). The court also quoted from the Guidelines regarding the importance of client interviews in helping counsel ascertain the facts and develop an adequate defense. *Id.* at 620.

The court further found that counsel conducted no independent investigation in formulating his trial strategy. It recognized that "[t]he Guidelines emphasize the importance of interviewing potential witnesses during pre-trial investigation," and that counsel's failure to interview any of the state's witnesses left him unable to evaluate his planned strategy.

***Robin M. Maher**, Esq. is the Director of the American Bar Association's Death Penalty Representation Project in Washington, DC. The Project recruits pro bono counsel for death row inmates nationwide, educates the bar and public about the lack of qualified, competent and adequately compensated counsel in capital cases, and works for reform of the systems that provide counsel to indigent defendants charged with or convicted of the death penalty.* *The author wishes to thank Staff Attorney Rebecca Coffee and law student Kristen Binck for their research assistance. The opinions expressed herein are the author's own.*

Endnotes:

1. The ABA Guidelines are reprinted at 31 Hofstra L. Rev. 913 (2003) and can be downloaded in pdf format at www.probono.net/deathpenalty.
2. Guideline 1.1, History of Guideline.
3. The earlier case was *Williams v. Taylor*, 529 U.S. 362 (2000).
4. Guideline 9.1, "Funding and Compensation," commentary (citing ABA Standards for Criminal Justice: Providing Defense Services Standard 5.1-6 (3d ed. 1992). ■

Thou shalt not ration justice.

-- Judge Learned Hand

DEALING WITH JAIL FEES

by Bryan Underwood

In 1692, as the Salem witch trials drew to a close, it is believed that Samuel Parris, the father of an accuser and the owner of an accused witch, Tituba, a West Indian slave, sold Tituba in order to pay her jail fees.[1] Pete Rose was perhaps the most famous prisoner of modern time to be ordered by a court to pay for the costs of his incarceration. Presently, jail fee reimbursement is authorized by statute in Kentucky as well as in several other states. These statutes embody the pragmatic, fiscal policy that people who commit crimes, causing harm to individuals and the community, should pay for a portion of their incarceration costs, which are significant. Now, try telling this to a poor client at sentencing when he or she cries, "I can't afford to pay that jail fee."

While attempting to avoid a debate over the wisdom or utility of such fees, this article examines the law underlying court-ordered jail fee reimbursement and possible legal challenges to such orders and fees when representing indigent criminal defendants. The statutory provisions establishing Kentucky's jail fee are scattered throughout the Kentucky Revised Statutes. The earliest provisions enacted by the General Assembly can be found in KRS Chapter 534 of the penal code under the title "Fines," codified at KRS 534.045. Subsequently, several other provisions were added to the penal code with the enactment of the Kentucky Racial Justice Act, codified at KRS 532.350, KRS 532.352, KRS 532.356 and KRS 532.358. Additionally, KRS 441.265 discusses jail fee reimbursement as it relates to the county jailer's authority to collect fees. Finally, KRS 439.179 authorizes jailers to collect the wages of an inmate allowed the privilege of work release in order to defray the costs of incarceration.

The provisions, with some exceptions mentioned in the footnotes, do not appear to be in conflict. To answer the question what process is due a defendant to be assessed a jail fee, these provisions can be synthesized to require courts to consider the following factors:

1. The actual per diem, per person, cost of incarceration.[2]
2. The cost of medical services provided to a prisoner less any co-payment paid by the prisoner.[3]
3. The prisoner's ability to pay all or part of his incarceration costs,[4] subject to the following limitations:
   (i) The reimbursement fee shall not exceed 25% of the prisoner's gross daily wages or $40 per day;[5]
   (ii) Joint ownership in any property, both real or personal, shall not be considered as evidence of ability to pay;[6]
   (iii) The income, assets, earnings, or other property, both real or personal, that might be owned by the prisoner's spouse or family shall not be considered as evidence of ability to pay;[7] and
   (iv) The fee shall bear a reasonable relationship to the person's income.[8]

The amount of the reimbursement fee may be challenged in any appeal taken from the original conviction.[9] The person affected by the payment order may also petition the sentencing court at any time to modify the jail bill to reflect any changes in the financial status of the person.[10] Other challenges to the jail fee, however, should be made at the time of sentencing in order to preserve the issues for appeal. Constitutional challenges, as applied to a particular defendant, may include: (1) an excessive fines challenge; (2) an equal protection and imprisonment for debt challenge; and (3) preemption challenges. The remainder of this article considers these constitutional challenges.

Excessive Fines Challenge

The word "fine" was understood by drafters of the 8th Amendment to mean a payment to a sovereign as punishment for some offense.[11] Any punitive forfeiture to the state is subject to scrutiny to determine if it violates the "excessive fines" clauses of the 8th Amendment and section 17 of the Kentucky Constitution.[12] KRS 534.045 is codified in KRS Chapter 534 of the penal code under the title "Fines." KRS 532.356 describes the jail fee as one of several "sanctions" the sentencing court must impose upon a person's conviction. Kentucky's bankruptcy courts have taken the position that the Kentucky Legislature intended for the cost of incarceration imposed pursuant to KRS 534.045 to be penal in nature, rather than compensatory, and thus excepted from discharge under the bankruptcy code.[13]

Despite these statutory references to the jail fee as a penalty, at least one panel of the Court of Appeals has taken the position that the jail fee is not a fine: "The incarceration fee in the present case is not in the nature of a fine or penalty. Rather, it is similar to an attorney's fee recoupment, to be applied on a graduated scale where the defendant can afford to pay the cost or a portion thereof for his detention."[14] This unpublished case, however, was reviewing the trial court's failure to hold a hearing on the defendant's ability to pay and reversed on that ground.[15] It did not involve an excessive fine challenge.

Borrowing the United States Supreme Court's "proportionality" test used in analyzing whether a sentence violates the "cruel punishment" prohibition of the 8th Amendment, the Kentucky Supreme Court has adopted the guidelines discussed in *Solem v. Helm*, 463 U.S. 277 (1983), for determining

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whether a fine runs afoul of the prohibition against excessive fines under section 17 of the Kentucky Constitution.[16] The following factors are used to determine whether the fine is excessive: (1) The gravity of the offense and harshness of the penalty; (2) The sentence imposed upon other criminals in the same jurisdiction; and (3) The sentences imposed for commission of the same crime in other jurisdictions.[17] These factors provide a useful analytical framework for examining jail fees.

(1) Whether the jail fee is disproportionate to the gravity of the offense.

Under Kentucky's scheme, the jail fee is limited to misdemeanants.[18] Thus, the maximum jail fee that could be imposed based on a 365 day jail sentence, at the maximum of $40 per day, would be $14,600. Under Kentucky's scheme, the longer the jail sentence, the more punitive the jail fee becomes. In contrast, the maximum fine that can be assessed for a class A misdemeanor is $500.[19] Further, this fine cannot be imposed upon any person determined by the court to be indigent pursuant to KRS Chapter 31.[20] With poor clients, the jail fee is often more punitive than the jail stay.

Most cases examining the issue of proportionality look simply at the fairness of forfeiting a particular asset owned by the defendant and used in the commission of a crime.[21] If the asset was used in the commission of the crime, or purchased with the proceeds of the crime, prosecutors can bank on courts allowing its forfeiture. This line of cases is not particularly useful when considering the fairness of garnishing a person's future wages for jail fee reimbursement. Interestingly, however, the United States Supreme Court recently ruled that punitive damage awards exceeding a single-digit ratio between punitive and compensatory damages violates due process.[22] Imagine the delight of plaintiff attorneys, and the horror of the corporate defense bar, if the United States Supreme Court had ruled that a punitive damage award could not exceed 25% of a corporation's gross profits. In most misdemeanor cases, the defendant will seldom have made a profit from his crime. Nor, in most misdemeanor cases, will the victim have suffered serious economic losses. Yet the Commonwealth is awarded up to 25% of the defendant's gross daily wages if he or she is given a jail sentence. This incentive to give defendants jail time for crimes that may not otherwise warrant incarceration results in a type of inflation, inflating the plea recommendations of prosecutors and subsidizing stiffer sentences imposed by judges.

(2) Whether the jail fee is disproportionately more punitive than penalties imposed upon other convicted criminals in Kentucky.

To answer this question, an informal survey was conducted using the Public Advocacy's e-mail system. The Mason County Detention Center (MCDC), housing inmates from Mason, Bracken, Fleming and Robertson Counties, charges a boarding fee of $25 per day to the county responsible for the inmate. The fee is set by county ordinance, which provides the fee is to be collected from the inmate for the responsible county by order of the sentencing court.[23] Approximately 7% of MCDC's total budget is made up of reimbursement and other fees.[24] A $25 dollar per day jail fee presumes that the person being charged earns $100 per day, which translates to $12.50 per hour based on an eight-hour workday.

By law, community labor is limited to a maximum of eight-hours per day, five days per week.[25] Male, Mason County inmates may earn a $50 per day credit against the jail fee as well as other fines and court costs by doing community labor at the Mason County Recycle Center. Limited community service opportunities may exist in other counties. Non-Mason County inmates, and female Mason County inmates, may earn the same credit by working at other community service projects within the county responsible for their housing, if and when available. MCDC also has a work release program for employed inmates. These inmates assign 25% of their gross daily wages to the jailer for a minimum $12 per day fee up to a maximum of $40 per day.[26] The work release fee collected by the jailer is credited against the $25 per day daily boarding fee by the sentencing court and the prisoner is assessed the balance.[27]

An e-mail survey of other public defenders around the state showed the following. The Johnson County Regional Detention Center, housing inmates from Johnson, Martin, Lawrence and Magoffin Counties, charges a jail fee of $30 per day.[28] In Lawrence District Court it is assessed as a court cost, but not in Magoffin District Court.[29] A $30 per day jail fee presumes that the person grosses $120 per day, for an hourly wage of $15.

The fee is $20 per day in the following counties: Wayne,[30] Davies,[31] Hart,[32] Henderson,[33] Hopkins,[34] Logan,[35] Laurel,[36] Crittenden and Webster.[37] A $20 jail fee presumes the prisoner grosses $80 per day, earning $10 per hour. The Boyle County Detention Center (BCDC) also charges $20.00 per day for the first 10 days and thereafter the jailer "negotiates" with the inmate to see how much they can pay.[38] The BCDC collects the fee directly from the prisoner, rather than through the sentencing court, and the amount depends on the prisoner's income and number of dependants.[39]

The Grant Count Detention Center (GCDC) charges District Court inmates a $20 per day minimum "work release" fee, or 25% of the prisoner's wages not to exceed $60 per day, whichever is greater.[40] Additionally, according to a fee schedule published by GCDC, Circuit Court inmates are charged a flat fee of $30 per day and inmates serving weekends are charged $60 per day.[41] In practice, all inmates are ordered to pay the fee regardless of their employment status.[42]

In Kenton County the jail fee is $5 per day.[43] In Madison County the inmates pay a one time booking fee of $25.[44] In McCracken County, inmates pay $7 per day for weeknights,

and $15 per day on weekends.[45] There is no per diem jail fee imposed by the Court or collected by the jailer in Rockcastle County[46] or in Lewis County. Because the jail fee legislation is not being uniformly applied throughout the state, there will be instances where the jail fee is disproportionately more punitive than penalties imposed upon other convicted criminals in Kentucky. For example, 180 days in jail in Fleming County would cost the prisoner $3600, while in neighboring Lewis County it would cost the prisoner only his time and opportunity costs.

(3) Whether the jail fee is disproportionately more punitive than penalties imposed for the commission of the same crime in other jurisdictions.

Other jurisdictions have adopted prison reimbursement acts.[47] At least two states, Michigan and Ohio, require the state to institute a separate civil proceeding to obtain reimbursement from an inmate.[48] Another model of state jail fee legislation simply gives prison authorities the power to intercept and take funds that come into the possession of the prisoner; for example, by reason of work release[49] or by inheritance.[50] Kentucky, however, is among the jurisdictions, maybe the only jurisdiction, where it is permissible to mandate reimbursement as part of the defendant's sentence. Indeed, despite some discretionary language to the contrary,[51] many courts feel they must assess a jail fee as part of the defendant's sentence.[52] Kentucky's scheme also mandates that the sentencing court impose a jail reimbursement fee upon a prisoner that has completed his sentence and authorizes the court to enforce the payment order through its contempt powers.[53] Within jurisdictions that treat jail fee reimbursement as a civil matter, prisoners would presumably retain many of the same rights, remedies and defenses that an ordinary debtor would have in a creditor-debtor dispute. In Kentucky, however, the debtor-prisoner is strictly at the mercy of the creditor-judge that originally ordered the reimbursement fee.

Imprisonment for Debt and Equal Protection Challenges

If a jail fee is not a fine, then it is a debt. Absolute, strict criminal liability for failure to pay a debt would raise serious questions under section 18 of the Kentucky Constitution which states, "The person of a debtor, where there is not strong presumption of fraud, shall not be continued in prison after delivering up his estate for the benefit of his creditors in such manner as shall be prescribed by law."[54] Similarly, the Equal Protection Clause of the 14th Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status.[55] To clear these constitutional hurdles, the Kentucky General Assembly has essentially delegated to the Judiciary the power to impose an income-based, usage tax on persons incarcerated in local or regional jails.

A jail bill may not exceed 25% of the prisoner's gross daily wages or $40 per day.[56] To illustrate, an inmate who lives off of trust fund income, assuming he draws over $160 per day, or in excess of approximately $58,000 per year, could be assessed the maximum jail fee of $40 per day. The per capita income of an average Kentucky resident is approximately $25,657, or approximately $70 per day.[57] This average person could be charged $17.50 per day. A person earning a minimum wage of $5.15 per hour working eight hours per day for a gross daily wage of $41.20 could be charged $10.30 per day. A defendant earning a poverty level income of $8,240, or approximately $22.50 per day, could be charged only $5.63 per day.

In essence, the jail fee is a flat "sin" tax that burdens most those least able to pay the tax. The jail fee is set at sentencing based on the defendant's pre-trial income and employment. After serving his sentence, however, unless the prisoner was granted the privilege of work release, his income will likely have fallen to nothing. The current scheme places the burden on the defendant to petition the court for a modification. In the best case scenario, the defendant finds equivalent or better post-sentence employment. This person would not qualify for or desire a modification. In the worst case scenario, the defendant finds a job making less money or is unable to find sustained employment. This person is likely to end up attending a seemingly endless stream of show cause hearings where the person is perhaps given more time to pay, but no modification. Eventually, the person may be held in contempt, be re-incarcerated and incur additional jail fees. And so the cycle begins again. The costs to the criminal justice system can be significant and can exceed the money received from the indigent.

Nevertheless, imprisonment to redress the intentional financial abandonment of one's legal responsibilities, as in flagrant non-support cases, has been upheld by the Kentucky Supreme Court.[58] Of course, prior to any incarceration the defendant has the right to counsel and the constitutional and statutory right to a hearing to determine present ability to pay.[59] Query whether a prisoner serving a sentence for civil contempt who is unable to pay a delinquent fine or child support obligation, and thus purge the contempt, should be assessed a jail fee to add to the crushing debt owed to the Commonwealth. The prisoner who cannot make bond is perhaps harmed the most by the imposition of a jail fee. While waiting for his or her case to go trial, the jail fee is already accruing at rate in excess of the $5 per credit provided for by Rule of Criminal Procedure 4.58, if that provision even applies to offset jail fees. The prisoner, most likely, will not be eligible for work release or community labor until final sentencing. So the decision to plead guilty becomes a predominately economic decision.

Preemption Challenges

Finally, what about the defendant who is already completely dependant upon the state for his or her care prior to and after a period of incarceration. In *Bennett v. Arkansas*[60] the Supreme Court held that a state may not attach a prisoner's social security benefits in order to defray the costs of incarceration. The Social Security Act provides that "none of the

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moneys paid or payable . . . under [the Act] shall be subject to execution, levy, attachment, garnishment, or other legal process."[61]

While the Social Security Act expressly forbids the attachment or garnishment of social security benefits, it does provide local and state correctional facilities with an alternative remedy where a beneficiary is being incarcerated at state expense.[62] The Social Security Administration (SSA) will suspend benefits for any period of continuous confinement in a correctional or mental health institution for more than 30 days following a conviction for a misdemeanor or felony.[63] The SSA provides incentive payments to correctional facilities for information leading to a suspension of benefits: $400 for information received within 30 days after an individual's date of conviction and confinement; and $200 for information received between 30 and 90 days after an individual's date of conviction and confinement.[64] Such nominal payments would do very little to offset the cost of incarceration assuming they are even applied in that manner. However, this is the only remedy under the Social Security Act that Congress has extended to the States.

In Kentucky, many courts have become collection agents for local and regional jails. Kentucky law makes no express provision for the attachment or garnishment of social security benefits in order to defray the costs of incarceration.[65] Kentucky Courts may instead rely on their contempt power to collect jail fees.[66] Payment of a jail bill is often made a condition of probation and conditional discharge of a jail sentence. Arguably, *Bennett* supports the conclusion that a prisoner or probationer whose sole source of income is social security cannot be held in contempt or revoked for his non-payment of jail reimbursement fees. If so, *Bennet* precludes a trial court from ordering such a prisoner to pay a jail bill under penalty of contempt or as a condition of probation.

Conclusions and Recommendations

Today, no one is going to be sold into slavery in order to pay off a jail fee. Yet, in the current economic and political environment, the temptation to balance budgets on the backs of the disenfranchised, working poor will cause more jailers, local government officials, county attorneys and judges to seek jail fee reimbursement. We can attempt to persuade them that the best interests of society are served by first requiring them to meet the immediate needs of their families - food, housing, health care, child support - so their families do not need further assistance from the state. Rather than deterring those impoverished from being able to succeed and becoming contributing members of society a better policy would be to have them contribute back to the community by their work and taxes. Our long term societal self interest is to reform their behavior, have them repair the harm to the community and restore them to non-offending, contributing members of our communities. Nevertheless, the General Assembly has given local elected officials the option to impose and collect jail fees, but not without limitations. So, when our clients in the docket say to us, "I can't afford to pay that jail fee," we must translate that to mean, "I want a fair and full hearing into my ability to pay the jail fees." We can demand strict adherence to the statutory guidelines and protections without debating the wisdom or utility of jail fee reimbursement.

To achieve uniformity, proportionality, and compliance with the law, jail fee schedules must incorporate the caps set in KRS 534.045(1). For example:

Hourly Wage	Gross Daily Wage	Jail Fee per day (25% of gross daily wage)
$5.15	$41.20	$10.30 per day
6	48	12
7	56	14
8	64	16
9	72	18
10	80	20
11	88	22
12	96	24
13	104	26
14	112	28
15	120	30
16	128	32
17	136	34
18	144	36
19	152	38
20	160	40 (statutory cap)

Local elected officials should be encouraged to adopt a fee schedule that incorporates the caps or to amend their current fee schedule to reflect the caps. Additionally, judges must be discouraged from simply rubber stamping the fee schedule adopted by the jailer and local government officials, even one that incorporates the fee caps set in KRS 534.045(1). For the fee to bear a reasonable relationship to the person's income, pursuant to KRS 534.045(3), the court must consider the person's real, net income, and not simply their gross daily wage. A full hearing into the person's financial condition, with strict adherence to the statutory guidelines, will strengthen any concurrent or subsequent allegations of constitutional violations.

Endnotes:

1. Frank McLynn, *Famous Trials: Cases that made History*, p. 77 (Reader's Digest 1995).
2. KRS 532.352(2)(a).
3. KRS 532.352(2)(b).
4. KRS 532.352(2)(c); KRS 441.265(4)(b).
5. KRS 534.045(1); but see KRS 441.265(2)(a) which places cap at $50 per day.
6. KRS 534.045(2)(a)-(b).
7. KRS 534.045(2)(c).
8. KRS 534.045(3).
9. KRS 534.045(3).
10. KRS 534.045(3).
11. *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265, 109 S.Ct. 2909, 2915 (1989).
12. *Commonwealth v. Flint*, Ky., 940 S.W.2d 896, 897-898 (1997).
13. *In Re Maxwell*, Ky., 229 B.R. 400, 404-405 (Bank. W.D. 1998).
14. *Dean v. Commonwealth*, Ky. App., 2001-CA-000744-MR, 2 (2002) (not to be published) (http://dpa.ky.gov/opinions/Index/Weekly/coa2002/0823.html).
15. *Id*. at 3.
16. *Id.* at 898.
17. *Id.*
18. But see KRS 532.352(1) which authorizes the Court to order Class D felons to reimburse the state or local government for housing expenses; KRS 441.265(8), on the other hand, provides that a local jail may not charge a fee to a prisoner the Department of Corrections is financially responsible for housing. This provision appears to be intended to permit a Circuit Court to order an inmate to reimburse the county responsible for housing the prisoner for the period of incarceration prior to sentencing at which time the Department of Corrections becomes responsible for the expense of housing the inmate.
19. KRS 534.040(2)(a).
20. See KRS 534.040(4) which states "Fines required by this section shall not be imposed upon any person determined by the court to be indigent pursuant to KRS Chapter 31," and *Simpson v. Commonwealth*, Ky., 889 S.W.2d 781, 784 (1994) where Court took judicial notice that person represented by an assistant public advocate at sentencing was indigent and thus could not be required to pay a fine.
21. *Flint* at 898.
22. *State Farm Mutual Automobile Insurance Co. v. Campbell*, 123 S.Ct. 1513, 1525 (2003).
23. Mason County Fiscal Court Ordinance Number 02-05 (Adopted September 10, 2002) (revised 03/28/03) (hereinafter Ordinance # 02-05).
24. Lisa Dunbar, Staff Writer, "The final word on the economics of incarceration," Maysville Ledger Independent (April 4, 2003) (http://www.maysville-online.com/articles/2003/04/25/news/news04.txt).
25. KRS 533.070(4).
26. Ordinance # 02-05.
27. But see KRS 441.265(8) which provides that no per diem shall be charged by the jailer to any prisoner required to pay a work release fee, and KRS 534.045(4) which provides that the court shall not assess jail fee reimbursement as long as person remains employed (and is presumably paying the work release fee).
28. Kristi Gray, Staff Attorney, Office of Public Advocacy, *e-mail survey response* (Aug. 12, 2002).
29. Kristi Gray, Staff Attorney, Office of Public Advocacy, *e-mail survey response* (Dec. 21, 2003).
30. Carolyn Clark, Staff Attorney, Office of Public Advocacy, *e-mail survey response* (Aug. 14, 2002)
31. Rich Walls, Staff Attorney, Office of Public Advocacy, *e-mail survey response* (Aug. 12, 2002).
32. Sally Wasielewski, Staff Attorney, Office of Public Advocacy, *e-mail survey response* (Dec. 22, 2003).
33. William Nesmith, Staff Attorney, Office of Public Advocacy, *e-mail survey response* (Aug. 14, 2002).
34. Mike Ruschell, Staff Attorney, Office of Public Advocacy, *e-mail survey response* (Jan. 5, 2004).
35. Chris Woodall, Staff Attorney, Office of Public Advocacy, *e-mail survey response* (Dec. 23, 2003).
36. Roger Gibbs, Staff Attorney, Office of Public Advocacy, *e-mail survey response* (Aug. 13, 2002).
37. Ginger Massamore, Staff Attorney, Office of Public Advocacy, *e-mail survey response* (Dec. 29, 2003).
38. Ted Dean, Staff Attorney, Office of Public Advocacy, *e-mail survey response* (Aug. 13, 2002).
39. Interview Sergeant Melissa Adams, Boyle Co. Detention Center (May 22, 2003).
40. William Adkins, Contract Attorney, Office of Public Advocacy, *e-mail survey response* (April 14, 2003).
41. *Id.*
42. *Id.*
43. Tina Bryant, Administrative Assistant, Office of Public Advocacy, *e-mail survey response* (Aug. 14, 2002).
44. Meena Mohanty, Staff Attorney, Office of Public Advocacy, *e-mail survey response* (Aug. 13, 2002).
45. J. Boone Reed, Staff Attorney, Office of Public Advocacy, *e-mail survey response* (Aug. 12, 2002).
46. Meena Mohanty, Staff Attorney, Office of Public Advocacy, *e-mail survey response* (Aug. 13, 2002).
47. See George L. Blum, J.D., *Validity, Construction, and Application of State Statute Requiring Inmate To Reimburse Government For Expense Of Incarceration*, 13 A.L.R.5th 872.
48. *Id*. at 894-896; see also *Tense Times: The Past, Present and Future of Prisoner Reimbursement*, 77 Mich. B.J. 190 (1998)
49. *Hogan v. Arizona Board of Pardons & Paroles*, 501 P.2d 944, 948 (Ariz. 1972); *Cumbey v. State*, 699 P.2d 1094, 1098 (Okla. 1985).
50. *Burns v. State*, 793 S.W.2d 779, 780 (Ark. 1990).
51. KRS 532.352(1) and KRS 534.045(1) provide that the court "may" order jail fee reimbursement.
52. KRS 532.356(1) and KRS 441.265(1) provide that the court "shall" order jail fee reimbursement.
53. KRS 532.358.
54. *Blanton v. Commonwealth*, Ky. App., 562 S.W.2d 90, 94 (1978).
55. *Tate v. Short*, 401 U.S. 320, 399-400, 91 S.Ct. 668, 671 (1971).
56. KRS 534.045(1).
57. Kentucky Cabinet for Economic Development (http://www.thinkkentucky.com/edis/deskbook).
58. *Waddell v. Commonwealth*, Ky. App., 893 S.W.2d 376, 381 (1995).
59. *Lewis v. Lewis*, Ky., 875 S.W.2d 862, 865 (1993).
60. 485 U.S. 395, 108 S.Ct. 1204 (1988).
61. *Id*. at 396 (quoting 42 U.S.C. sec. 407(a)(1982 ed., Supp. III)).
62. Ticket to Work and Work Incentives Improvement Act of 1999, P.L. 106-170, 113 Stat. 1860 (Dec. 17, 1999).
63. *Id.*
64. *Id.*
65. See KRS 532.160 through KRS 532.16 on criminal garnishment.
66. KRS 532.358. ■

KACDL Works in Frankfort to Insure Fair and Just Criminal Justice Laws

by W. Robert Lotz
KACDL Legislative Director

The 2004 Legislative Session is over. This article touches briefly on criminal justice bills which passed and bills which did not pass with a focus on bills of interest to the criminal defense practitioner.

As KACDL's Legislative Representative, I attended meetings of the House Judiciary Committee and the Senate Judiciary Committee, met with individual legislators on pending legislation, assisted in drafting pending legislation and testified before the committees. The Kentucky Association of Criminal Defense Lawyers is regarded as a positive and competent source of information by most members of the legislature, even though we often stand alone in our advocacy for citizens accused or convicted of crime in this Commonwealth.

When I compare our laws and penalties to those in many of our surrounding states, I see the positive impact of the legislative presence which our organization has maintained since its inception. Our Association has forged long-term contacts with legislators from both parties when it comes to addressing matters of criminal justice legislation.

There are a number of new crimes which will be added to the criminal code or to other sections of the statutes. **House Bill 108** creates the crime of fetal homicide. As passed, this bill creates separate homicide offenses for the killing of an unborn child while still in utero. This is probably the most significant criminal justice bill passed by the legislature. Together with other organizations KACDL was successful in having a clause inserted preventing a conviction for fetal homicide from triggering a death penalty specification.

House Bill 7 makes it a Class D felony to use a scanning device or reencoder to gather information from a credit or debit card or to place information on the magnetic strip of a different card with the intent to defraud. This bill is aimed at preventing "double swiping" of cards to capture information and assist identity thieves.

Senate Bill 86 creates a new crime of Criminal Simulation. It will be a Class A misdemeanor to use any product which is designed to defraud an alcohol or drug test. Commercial manufacturing, marketing or distribution of such products is a Class D felony.

As always KACDL opposed numerous bills aimed at creating new criminal offenses which did NOT pass into law. These bills included an expanded definition of elder abuse, controlled substance endangerment to a child, felony murder, inappropriate sexual conduct in the presence of a minor, theft of day care services, price gouging during a state of emergency, public indecency, and bad checks to landlords as theft. Some of these bills have appeared in prior legislative sessions and it is to be anticipated that attempts to pass them will continue in future legislative sessions. KACDL will continue to oppose such bills.

Robert Lotz

Senate Bill 102, which would have created a new sexual offense under Chapter 510 for using an electronic communication system in order to procure a minor or peace officer posing as a minor to commit certain sexual offenses did not pass. It died in the last days of the legislature. As a result, I would anticipate that individuals engaging in this type of conduct will be charged with attempted unlawful transaction with a minor in the first degree, a Class C felony. I am not aware of any change in the plans of the Kentucky State Police to be instituting its own "sting" operation where police officers cruise the chat lines posing as underage sexual targets.

A number of bills were passed amending current criminal statutes, amending the penalties under current criminal statutes, or adding to the consequences of a criminal conviction. Most of these bills were opposed by KACDL, but some of them were amended in substantial aspects in an attempt to reduce their effect wherever possible. Perhaps the most significant bills were **House Bill 157**, which will increase the DUI service fees by another $75.00, and **House Bill 413**, which will increase court costs by $20.00. My local clerk has informed me that House Bill 413 is already being enforced and that court costs have been increased. **House Bill 71** increases the fines for handicap parking violations and **Senate Bill 85** doubles the fines for speeding in school zones. **Senate Bill 145** enhances penalties for multiple convictions of indecent exposure before minors. As originally filed a first offense was a Class A misdemeanor and a second or subsequent offense was a Class D felony. KACDL opposed this bill and was successful in having it amended so that a second offense is a Class A misdemeanor and a third or subsequent offense is a Class D felony but only if committed within 3 years of the prior conviction.

Numerous bills were introduced aimed at enhancing the penalties and controls for sexual offenders. KACDL worked hard to attempt to be the only voice speaking out against the increased piling on of penalties for such offenders. One of the bills which passed was **Senate Bill 189** which will prohibit the employment of certain felons in mental health and mental retardation facilities. However this bill was substantially amended from its original version which would have contained a blanket prohibition on all felons and would have applied to all nursing homes. A number of bills were opposed by KACDL and FAILED. These included **House Bill 303** which would have prohibited registered sexual offenders from being on or about school and daycare grounds, **House Bill 312** and **House Bill 366** which would have increased the penalty for possession of child pornography to a Class D felony, **House Bill 43** which would have mandated sheriffs to notify neighborhoods of sexual offenders under lifetime notification requirements, **House Bill 205** which would have created sexual offender chemical treatment programs, **HCR 13** which would have created a sex offender management task force, and **Senate Bill 66** which would have expanded the statute of limitations for civil suits in child sex abuse cases from 5 years to 20 years.

In the area of DUI Legislation, the only bill which passed was the increase of service fees. KACDL opposed an attempt to create a new zero tolerance per se DUI offense when driving with any measurable level of a controlled substance in the blood or urine. However this issue may come up for hearing during the Interim Session. A bill making certain "Kiddy" DUIs into enhanceable offenses also failed to pass.

In the area of Juvenile Justice Rep. Robin Webb was successful in passing **House Bill 550**, an Omnibus Juvenile Justice Bill. Among other things, this bill prohibits the handcuffing or other attachment of juveniles to stationary objects, provides that if a timely detention hearing is not held a child must be released to their parents, eliminates a court's authority to grant DJJ guardianship of a youthful offender, eliminates home incarceration as a dispositional option for public offenders, allows for a disposition of parental supervision, requires the court to set conditions of probation and sanctions to be imposed upon violation, prevents juveniles who are under 13 at the time of commission of an offense from being classified as juvenile sexual offenders because they are older when charged, allows an assessment to recommend that a child not be declared a sexual offender or receive treatment, provides that a juvenile sexual offender receive credit for their treatment program upon transfer to the Department of Corrections, excludes juvenile sexual offenders from the prohibition on residing within 1,000 feet of a school or daycare, and requires the PSI sexual evaluation before final sentencing of youthful offenders to be done by DJJ evaluators rather than the Department of Corrections. KACDL supported all of these provisions of the bill. In response to a federal mandate the bill also will amend the current law which allows youthful offenders reaching 18 to be kept in the juvenile system for another 6 months but only slightly. In the final version the youthful offenders can be kept in the system until the age of 18 years and 5 months. Robin Webb deserves our thanks for this thoughtful and positive piece of legislation. **Senate Bill 152** also passed which requires that juvenile petitions now be reported to the principal of the school within 24 hours. **House Bill 6**, which would have enacted the new interstate compact for juveniles in Kentucky, failed to pass, even though KACDL had supported the Bill and been successful in having a representative from DPA and a representative from KACDL added to the state commission which would be created under the interstate compact. I anticipate that we will see this bill in the next session. Other juvenile bills which failed to pass included **Senate Bill 213** which would have changed the rules regarding incompetency to participate in juvenile proceedings and **Senate Bill 218** which would have restricted juvenile court authority over juveniles who are in the custody of the Cabinet for Families and Children.

There will be little amendment to state law regarding drug enforcement. A number of bills were introduced in an attempt to respond to the decision of the Kentucky Supreme Court in *Kotila vs. Commonwealth*, Ky., 114 S.W.3d 226 (2003) holding that possession of some but not all the chemicals or equipment does not satisfy the statutory language for the offense of manufacturing methamphetamine. There was a tremendous effort to reach some type of compromise or redrafting of the laws regarding methamphetamine manufacturing, trafficking, and the possession and handling of precursors. In the end the House's compromised legislation failed to pass the Senate. A Senate Bill, creating the offense of chemical endangerment to a child, failed to pass the House. As a result *Kotila*, and the subsequent decisions of the Supreme Court further interpreting it, will remain the current status of the law regarding methamphetamine manufacturing. Under **Senate Bill 14**, which did pass, the KASPER database and reporting system for prescription medications in Kentucky will be expanded, so as to allow easier exchange of information between agencies and police authorities and so as to allow computer based searches of the data designed to pinpoint physicians, pharmacies and consumers showing patterns indicative of drug diversion. Under **Senate Bill 40**, which also passed, KASPER data will now be admissible in administrative proceedings aimed at Medicaid recipients who may be using multiple physicians or pharmacies. Both of these bills were opposed by KACDL. In a floor amendment to **House Bill 67**, a new law was passed allowing for the involuntary commitment of individuals for alcohol or drug treatment under the same basic procedures as commitment for mental illness under KRS Chapter 202A. The law requires that whoever files the petition guarantee payment for the treatment, essentially making the law available only to the insured or wealthy. KACDL opposed this bill and it invites constitutional challenge. KACDL supported **House Bill 83** which would have created a clean needles program for drug addicts and exempted such needles from drug paraphernalia laws, **House Bill 275** which would

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have created a nonviolent substance abuser parole program, **House Bill 359** which would have made the law against possession of controlled substance not in original container inapplicable to persons having a valid prescription for the medication, and **House Bill 547** which would have codified the requirement of a nexus between firearms and drugs before the enhancement provision under KRS 218A.992 would apply. Although these bills did not pass, KACDL will be supporting their passage in future sessions.

In the area of the death penalty, proponents of its abolition, both for adults and for juveniles, were once again disappointed by the inability to bring these issues to a vote. KACDL supported a bill to require the complete regarding of all custodial interrogations in capital cases which passed the House but died in Senate Judiciary Committee. The Association is committed to continue to support legislation regarding the mandatory recording of interrogations, which is also a fundamental legislative goal of NACDL and the Innocence Project. On a brighter note, along with others, KACDL did oppose an attempt to create a new death penalty aggravator for torture of a child, supported having the death penalty provision removed from the controlled substance endangerment to a child statute before it died, and was successful in having the capital consequences of fetal homicide convictions eliminated.

KACDL also opposed a number of other bills aimed at enhancing penalties for criminal offenses or restricting access to alternative sentencing. These bills, which did not pass, included **House Bill 407** which would have placed numerous limitations on the availability of shock probation, **House Bill 329** which would have made leaving the scene of an accident a felony under some circumstances, **House Bill 354** which would have made digital penetration an aggravated form of sexual abuse, and **Senate Bill 217** which would have included firefighters, EMT's and rescue squads in the groups under assault in the third degree.

There were a number of bills that KACDL supported which were kept alive by inclusion in either the House or Senate version of the proposed budget. Should a special session be called to pass a budget these bills may still have a chance of life. They include **House Bill 483**, the public service student loan assistance program which would have provided payments for the law school indebtedness of DPA and legal aide attorneys, as well as prosecutors, who fulfill a commitment to continue working in public service after graduation. KACDL supported this bill and will push it in the next Legislative Session.

Senate Bill 64, creating a telephonic behavioral health jail triage system, was successfully engrafted onto House Bill 157, which increased the DUI service fees. The new system will be funded by an additional $5.00 criminal court costs, making the total increase in court costs $25.00. Under the new system, smaller local jails will have 24/7 access by phone to a qualified mental health professional and more standardized response to mental health issues of prisoners.

House Bill 161, which would have eliminated the Criminal Justice Council as it currently exists and replaced it with smaller group under the control of the Justice Cabinet died in the last days of the Session. It is important that all of our members who serve on the current Criminal Justice Council renew their efforts to participate in, attend and prove the continued viability of the Criminal Justice Council if they wish for it to continue its existence. KACDL supported the continuance of the Criminal Justice Council during the 2004 Legislative Session.

In one final note, the Attorney General has issued an opinion (OAG 04-002) stating that the effective date for legislation enacted during the 2004 Regular Session is July 13. This effective date applies to all legislation enacted during the recent session, except for general appropriation measures and those containing emergency or delayed effective date provisions

Thank you to KACDL and all of its members for allowing me to represent you and your interests before the 2004 Legislature. Thanks to all of our members who took the time to make phone calls to individual legislators or to send e-mails or letters supporting or opposing legislation. Thanks to all of our board members who actually downloaded and reviewed the ongoing legislative reports which I disseminated to them during the session. Thanks to the Legislative Committee Members who fulfilled their commitment to review and vote on policy decisions regarding pending legislation. These members reviewed my legislative reports on a weekly basis and took the time to carefully vote their positions and bring additional issues regarding the language in the bills to my attention. Thanks also to Katie Wood, our KACDL President, who was available to give me prompt policy decisions in the day to day turmoil of this session. You can review the new legislation in greater detail by going to the Legislation Research Commission's website at www.LRC.state.ky.us. ■

KACDL Membership Information

Bar members 1-5 years $75.00
Bar members 5+ years $150.00

Public Defenders: 1-5 years $ 50.00
Public Defenders 5+ years $100.00
Non-attorney $ 25.00 per year

For membership information contact:

KACDL
Charolette Brooks
Executive Director
444 Enterprise Drive, Suite B
Somerset, Kentucky 42501
Tel: (606) 677-1687
Fax: (606) 679-3007
kacdl2000@yahoo.com

DPA Welcomes Two New Commission Members

In June, DPA welcomed two new Public Advocacy Commission members, Ken Schwendeman and Melinda Wheeler.

Ken Schwendeman

Ken Schwendeman earned his BS in Finance and Real Estate from Eastern Kentucky University, where he was commissioned through Army ROTC. He earned his Master of Public Administration degree from Eastern in December of 2000. He is currently working on his Ed.D. in Education Administration from the University of Kentucky Department of Education.

Ken retired in the grade of Major from the U.S. Army on January 31, 1997, with varied assignments including command, Theater Army level training operations, and counter-terrorism operations in Saudi Arabia. Ken came to the Department of Criminal Justice on March 1, 1997, as Principal Assistant. On January 6, 1999, Ken was promoted to Director of the Administrative Division. Ken is responsible for personnel, budget and financial activities.

On June 16, 2004, Ken was appointed as Executive Director of the Office of Legislative and Intergovernmental Services within the Justice and Public Safety Cabinet. The Office of Legislative and Intergovernmental Services assumed the support duties of the former Office of the Kentucky Criminal Justice Council.

Ken also serves as a legislative liaison for the Department, and is a member of the Justice Cabinet Strategic Planning Core Committee. He is the agency representative to the Richmond Chamber of Commerce, in which he serves as the chair of the Chamber Directory Committee. Ken is the volunteer Secretary-Treasurer for the Kentucky Law Enforcement Memorial Foundation.

Jerry Cox receiving the KBA President's Speicial Service Award from KBA President John W. Stevenson

Melinda Wheeler

Melinda L. Wheeler brings 28 years of experience with the Kentucky court system to her position as acting director of the Administrative Office of the Courts. She is responsible for the daily operation of the Kentucky Court of Justice, which supports the activities of more than 3,400 court system employees, including the elected offices of justices, judges and circuit court clerks. The AOC also executes the Judicial Branch budget and is under the direction of Chief Justice of Kentucky Joseph E. Lambert. Chief Justice Lambert appointed her as acting director in April 2004.

Ms. Wheeler started her extensive career with the AOC as a pretrial officer in 1976, just after the reformation of Kentucky's courts through passage of the Judicial Article to the state constitution in 1975. Since that time, Ms. Wheeler has held a variety of positions, including serving as general manager of Pretrial Services and Court Security and being named AOC Deputy Director in 2000.

Ms. Wheeler has traveled throughout the country training hundreds of professionals from pretrial services, criminal justice, public agencies and private sector organizations. Her presentations focused on interviewing techniques, body language interpretation, organizational design and management skills.

She has also represented the Kentucky Court of Justice on a national and state level. She is a former president of the National Association of Pretrial Service Agencies, and a current member of the Kentucky Bar Association's Joint Study Committee on Judicial Concerns, the KBA's Committee on Alternative Dispute Resolution, and the Kentucky Task Force on Court Security.

Ms. Wheeler is a native of Paintsville, Ky., and a graduate of Paintsville High School and Pikeville College. ■

KBA Award Recipient

INSTANT PRELIMS: MANUFACTURING METHAMPHETAMINE

by B. Scott West

From time to time, the District Court Column will feature "Instant Prelims," a short checklist designed to help prepare a cross-examination on one or more issues that frequently occur in preliminary hearing. Recognizing that defense attorneys often have a week or less between the arraignment and the preliminary hearing, "Instant Prelims" is designed to give a succinct statement of the law on the issue and a few tips on where and how to quickly get a witness or evidence on a low-budget or no-budget basis. The information or ideas in these short pieces will seldom be new to anyone who does a lot of preliminary hearings. However, these tightly packaged checklists may come in handy for those with little time to brush up on the law. Whether the goal is to get a dismissal, get an amendment to a lesser charge, or commit the Commonwealth to a version of facts early in the case, it is hoped that "Instant Prelims" will be useful. If anyone out there has an idea and would like to submit for publication an "Instant Prelim" of his or her own, please contact Editor Jeff Sherr.

This article deals with the charge of manufacturing methamphetamine, and is primarily based on the Kentucky Supreme Court's holdings in *Commonwealth v. Kotila*, Ky., 114 S.W.3d 226 (2003), and *Commonwealth v. Beaty*, Ky., 125 S.W.3d 196 (2003).

Much of the time there will be little a defense counsel can do in a preliminary hearing other than to establish that the defendant should not have been charged with the Class B felony of manufacturing. Rather, he should have been charged with a lesser included offense of attempting to manufacture methamphetamine, conspiring to manufacture methamphetamine, or unlawful possession of a precursor (ephedrine or pseudo-ephedrine). However, even if counsel should so persuade the judge, most cases are still going to be bound over to the grand jury, since RCr 3.14 requires only a finding that *a* felony (as opposed to a *particular* felony) has been committed. Nevertheless, bonds for a B felony are generally higher than bonds set on a C or D felony, and counsel may be able to get a bond reduction from the District Judge, even after the case has been bound over.

District Court Judges do have the jurisdiction, even after a case has been bound over, to modify or set a bond on a case. RCr 3.14(1) specifically provides that when the judge holds a defendant to answer in the circuit court, that the judge shall "commit the defendant to jail, release the defendant on personal recognizance or admit the defendant to bail if the offense is bailable." While it is true that "control" over bond passes to the Circuit Court "immediately" after a case is bound over (RCr 4.54), this cannot mean that jurisdiction passes, or RCr 4.54 would be expressly in conflict with RCr 3.14(1). The only reasonable interpretation is that the District Court can still set the bond after a preliminary hearing, but that the Circuit Court can set a new or change the bond conditions, thereby trumping the actions of the District Court. In fact, local rule may dictate that the Circuit Judge rather than the District Judge decides bond questions after a case is bound over, in which case you will need to inquire about getting a bond hearing with the Circuit Court, during which you can explain why your client should be facing a lesser charge than manufacturing meth.

B. Scott West

I. Manufacturing Methamphetamine, Generally

The present version of the manufacturing methamphetamine statute is codified at KRS 218A.1432 and provides as follows:

(1) A person is guilty of manufacturing methamphetamine when he knowingly and unlawfully:
  (a) Manufactures methamphetamine; or
  (b) Possesses the chemicals or equipment for the manufacture of methamphetamine with the intent to manufacture methamphetamine.

(2) Manufacture of methamphetamine is a Class B felony for the first offense and a Class A felony for a second or subsequent offense.

For the Commonwealth to establish even probable cause, much less, proof beyond a reasonable doubt, the Commonwealth must show that the defendant either (1) manufactured methamphetamine (that is, have a *finished* product), or (2) possessed either ALL the chemicals ***or*** ALL the equipment necessary to manufacture methamphetamine, and had the intent to manufacture methamphetamine.

A. Guilt Based Upon "Manufacturing Methamphetamine."

A defendant is guilty under the first prong of the statute when he "manufactures methamphetamine." The prosecutor will want to argue that this language, cast in the present tense, does not require an actual finished product, but rather requires only that the defendant is in the process of making methamphetamine.

The prosecutor may use an analogy such as the following: "Judge, suppose I'm building a house. Right now, all I am doing is pouring the foundation, using blocks and cement. But if someone asks me what I am doing, and I say 'I am building a house,' no one will look at me funny because I am, after all, in the early stages of building a house. No, I don't have a completed house, but I am nevertheless 'building' a house. I am guilty of building a house, if that's how you want to say it. The meth statute is the same way, when I begin the process of actually making methamphetamine, I am "manufacturing methamphetamine," even if I have not yet got the finished product."

How do you argue against that? The answer lies in the *Kotila* case. In that case the Court gave an example of an *attempt* to manufacture methamphetamine. Attempt, of course, is a lesser included offense of manufacturing. The Court stated:

> [A] defendant who possessed less than all the necessary chemicals to manufacture methamphetamine could be convicted of criminal attempt to violate KRS 218A.1432(1)(a) **if he had already begun the manufacturing process.** *United States v. Smith*, 264 F.3d 1012, 1016-17 (10th Cir. 2001)(though possessing less than everything needed to manufacture methamphetamine, defendant had begun the initial step in the manufacturing process, *i.e.*, soaking the ground-up pseudoephedrine tabets in water). [Emphasis added.] *Id.* at 245.

Thus, "pouring the foundation," is not equivalent to "building the house." Beginning the process of manufacturing is not manufacturing.

B. Guilt Based Upon Possession of the Chemicals or Equipment

The impact of the *Kotila* decision with regard to possession of chemicals or equipment is now widely known throughout the state: "We construe 'the chemicals or equipment' to mean all of the chemicals or all of the equipment necessary to manufacture methamphetamine."

- **Counsel must know in advance of the preliminary hearing what are the chemicals needed and what is the equipment needed.** Further, since there are various methods of making methamphetamine (the ephedrine reduction method for one, the red phosphorous method for another), counsel must know which method is being alleged in the present case.

  If you do not know the chemicals, equipment and processes for making methamphetamine, it is time to learn. Although it is unlikely that a chemist or other expert will be testifying at the preliminary hearing, you can bet that eventually an expert who does know how to manufacture methamphetamine will be testifying. How are you going to cross-examine him or her if you don't know what it takes to make the stuff?

  I am not going to state in this article – widely read and available to the public on the internet – where and how you can learn how to manufacture methamphetamine. But it is out there. (I myself learned from materials supplied to me by the state through discovery in a methamphetamine manufacturing trial. The state wanted to present a "learned treatise" for the benefit of a jury, and this "treatise" was in fact a how-to, step-by-step video.) However you accomplish it, the time to learn what all the chemicals or all the equipment necessary to manufacture is now, before you are appointed or hired to conduct a preliminary hearing.

- **Find out at the preliminary hearing what was seized.** Get an exhaustive list, either through testimony, or an inventory of items seized. It helps to have the return of a search warrant, if there is one, which lists the items. But you must also find out what items were destroyed there at the scene by HAZMAT personnel. In short, get the entire universe of what was seized.

- **Figure out yourself what is missing and specifically inquire about the missing items.** You must establish that at least one chemical is missing, and at least one piece of equipment is missing. Do not rely upon the officer's knowledge to fill in the gaps. If you ask the question "what chemicals are lacking, here," you are unlikely to get the answer "anhydrous ammonia and lithium batteries."

- **After establishing a lack of chemicals and equipment, then and only then, test the officer's knowledge of how to make meth.** The officer testifying will have either been trained how to manufacture methamphetamine, or he will not have been so trained. Find out. If he has been trained how to make meth, then ask if the officer believes that a batch of meth could be made solely using the items seized or found at the so-called lab. If he has not been trained how to make meth, bring out his lack of knowledge sufficiently to ensure that he will not be used by the Commonwealth as an expert in the future.

II. Lesser Included Offenses.

If the state does not establish probable cause that the defendant is guilty of manufacturing methamphetamine, the Commonwealth may try to establish a lesser included offense. Or, perhaps defense counsel is trying to establish an even lesser included offense, in order to get the bond lowered. Here is the range of lesser included offenses as I see them. There may be more – knock yourself out.

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A. Attempt

In *Kotila*, defense counsel was denied a lesser-included instruction for attempt to manufacture methamphetamine. In holding that proof of manufacturing methamphetamine required a finding of possession of all of the chemicals or all of the equipment, the *Kotila court* foreclosed an attempt instruction based upon the mere possession of *some but less than all* of the chemicals or equipment for the manufacture of methamphetamine. *Kotila*, at p. 243. For example, if an attempt charge is based solely upon the possession of ether, lithium batteries, and ephedrine pills, attempt to manufacture is not satisfied.

However, the *Kotila* court did identify two scenarios where a charge of criminal attempt to manufacture methamphetamine may properly lie.

- **Where the manufacturing process has begun.** One example of an attempt to manufacture methamphetamine has already been given above – where a person has less than all of the equipment or all of the chemicals, but has already begun the manufacturing process. *Id.* at p. 245.

- **Where a "defendant attempt[s], but fail[s], to obtain possession of *all* of the chemicals or equipment necessary to manufacture methamphetamine."** *Id.* at p. 246. For instance, where a person arranged to purchase from an undercover agent a complete lab contained in a U-Haul. *U.S. v. Leopard*, 936 F.2d 1138 (10th Circ. 1991). Note that the Supreme Court, not this writer, placed the emphasis on the word "all." Thus, an attempt to get *some* of the chemicals or *some* of the equipment will not suffice for attempt.

B. Possession of Precursor

Possession of ephedrine or pseudoephedrine or any of its salts, isomers, or salts of isomers is illegal when such possession is made with the intent to manufacture meth. KRS 218A.1437. It is a Class D felony for a first offense, and Class C for a second offense. Clearly, a possession of precursor charge is preferable to an attempt to manufacture charge.

C. Conspiracy to Manufacture Methamphetamine

If there are more than one co-defendant, the Commonwealth may attempt to establish a conspiracy to manufacture methamphetamine. A conspiracy charge is a C felony. However, to establish probable cause the Commonwealth must show at least some evidence of an agreement to manufacture. The fact that three defendants went into a store to purchase two boxes each of ephedrine should not immediately imply an intent to manufacture methamphetamine. What other reason could there be to purchase six boxes of ephedrine, the Commonwealth may ask?

For one, maybe the three were conspiring only to unlawfully distribute a methamphetamine precursor, codified at KRS 218A.1438. This is a Class D felony for a first offense and a Class C felony for each subsequent offense. If the Commonwealth has no other evidence of an agreement to manufacture, argue that there is just as much probable cause to believe that the three were intending to sell the ephedrine to another party. In fact, if no other chemicals or equipment are found on the three, why should manufacturing be assumed instead of trafficking?

Also, a conspiracy requires not only an agreement to commit the crime, but also an "overt act" in furtherance of the conspiracy. KRS 506.050.

D. Facilitation to Manufacture Methamphetamine

There is a fine line between "facilitation" (KRS 506.080) to manufacture methampetamine, and "complicity" (KRS 502.020) to manufacture methamphetamine. In both, a defendant must aid and/or abet someone who is charged with manufacturing methamphetamine. The basic difference is that an accomplice *shares in the intention* to manufacture methamphetamine, whereas the facilitator *knows* that the principal is going to manufacture methamphetamine, but otherwise *does not share in the intention* to make methamphetamine.

A classic example is the girlfriend who loans her boyfriend some money, knowing that he is going to use it to buy some materials to make methamphetamine at another person's house. So far, she has just facilitated the manufacture of methamphetamine. If, however, she intends that he is going to give her some of the finished product in exchange for her money, she is an accomplice.

If the Commonwealth is arguing accomplice liability rather than liability as a facilitator, use the preliminary hearing to establish just what evidence the Commonwealth has that the defendant *intended* to complete the crime, as a participant.

III. Double Jeopardy Issues

The law of double jeopardy is developing in the area of manufacturing methamphetamine.

A. Manufacturing Methamphetamine & Possession of Precursor

Where manufacturing is based upon possession of all the chemicals, and one of these chemicals is ephedrine, the Commonwealth may not procure convictions on both offenses. However, if the manufacturing charge is based on possession of *equipment*, possession of ephedrine will constitute

a separate offense because ephedrine is a chemical, not equipment. *Kotila,* at p. 242. Thus, the importance of establishing at the preliminary hearing exactly how the Commonwealth intends to prove its manufacturing charge is underlined.

B. Manufacturing Methamphetamine & Possession of Anhydrous Ammonia

Kotila held that manufacturing methamphetamine would not preclude a charge of possession of anhydrous ammonia in an unlawful container, because each requires proof of an element the other does not. Where a charge of manufacturing is based upon possession of chemicals, the statute requires possession of ALL of the chemicals, whereas the anhydrous statute requires only possession of the one chemical. Likewise, the anhydrous statute requires possession in an unlawful container, whereas the manufacturing statute makes no reference to containers. Thus, double jeopardy as defined by *Commonwealth v. Burge*, Ky., 947 S.W.2d 805 (1996) does not exist, for now.

C. Manufacturing Methamphetamine & Possession of a Controlled Substance (Methamphetamine)

Where the possession of a controlled substance charge under KRS 218A.1415 is based upon the possession of the *same* methamphetamine that was the product of the manufacturing charge, there is a double jeopardy violation. However, where the methamphetamine is proven not to be the result of manufacturing process (*e.g.*, where methamphetamine residue is found on a piece of aluminum foil), there will not be a double jeopardy violation. *Beaty*, at pp. 212-213.

IV. Conclusion

Kotila and *Beaty* ought to change the way practitioners conduct preliminary hearings on manufacture of methamphetamine cases. Now, more than ever, there is a need to "lock down" the Commonwealth into a set of facts, and pronounce at the earliest opportunity on what theory it is basing its manufacturing charge. Is there a finished product? Are all the chemicals present? Is all the equipment? Has Defendant been overcharged? The preliminary hearing is the first opportunity to get the answers to these questions, under oath, preserved for posterity….and bond review motions. ■

DPA ANNUAL CONFERENCE AWARD WINNERS

Robert Lotz receiving the Nelson Mandela Lifetime Achievement Award from Ernie Lewis

Traci Hancock receiving the In Re Gault Award from Ernie Lewis

TELLING YOUR CLIENT'S STORY IN A PERSUASIVE WAY THROUGH OPENING: A PRIMER

by Mark Stanziano

Verdict For You. No Waiting

If it has been true for several hundred years that "Time waits for no man," then it is now equally true that "no man waits for Time." If the 1960s were The Age of Aquarius, it is now just after the Dawn in the Millennium of Mercury. It is the season of instantaneous information on the internet and coeval commerce. The photos of *Life* Magazine have been replaced by the split-second glimpses of modern culture on MTV. Full length newspaper stories in the *New York Times* and the *Wall Street Journal* have been replaced by a few paragraphs and a headline, with graphics in cinematic color, no less, in the *USA Today*. Six minutes of interview on the network news shows; maybe fifteen on *Montel* or *Oprah*. People are moved to hold opinions, informed or otherwise, on every topic under the sun at the speed of sound bytes.

In short, we have just kicked off the 21st Century and no one waits for anything anymore. As a byproduct, no one is impartial on any topic for any longer than she has to be. Even now you are making up your mind whether to believe these assertions, or to continue to read this article, or not.

Time is in greater abundance because we have learned to lessen the amount we routinely need to live our, not necessarily fuller, lives. And, even though, as Will Rogers said in his autobiography, "half our life is spent trying to find something to do with the time we have rushed through our life trying to save," we still rush through our lives and have begun to see as an anathema anything which interferes with our efforts to spend the time we have been able to save in recreational ways which lead to our personal comfort.

Despite the rhetoric about how jury service is the right and obligation of every citizen, service as a indentured serf in the jury pool of the local judicial system is one such anathema. Those who cannot get out of such service want it over as quickly as possible so that they can move on with the "more important" things they have to do.

It is within the framework of this new reality that this article takes a brief look at that moment in a jury trial known as "the opening statement of counsel." With the view toward convincing the reader that opening statement is a moment of singular opportunity for counsel, I will show that the opening statement is the legal equivalent of Merlin's *Spell of Making* or Rumpelstiltskin's Spinning wheel; that magical process by which lead or, in the latter case, straw, may be turned into gold, through the pure sorcery that is the essence of the client's story, persuasively constructed, and vividly told.

Preliminarily Speaking

At the outset, it must be noted that opening statements are not really "statements" at all. They are carefully constructed arguments which, while incorporating the advocate's theory of the case and using the emotional themes chosen by the advocate to move the listener to action, are delivered in a hybrid method of grouping facts and evidence in a way to make points, arranging the points in a persuasive order and presentation of those points by using the ancient method of storytelling.

Close for Show. Cross for Dough
Directs are Too Hard and Openings Too Slow

The four major phases of any trial are the opening, the direct, the cross, and the closing.[1] In each phase, the goal is **either** to tell your story, to argue your case, and to advance your theory; **or**, to tear apart the story, the argument and the theory of one's opponent. Historically, legal scholars and members of the profession have raised cross-examination and closings to a sort of *filet mignon* status within the trial. Everything else that needs to be done is the trial work equivalent of *White Castles*. If you want proof, look at the offerings on the library shelves and listen to your friends in the profession when they recount their famous victories

Posner and Dodd's book on cross-examination is a best seller. Anthologies of the best closing arguments delivered throughout the long and storied careers of giants, locally and nationally known, are published regularly. Almost always when you are entertained with a story of some great triumph, by friend, foe or fabricator, that story has, at its heart, some supposed verbatim rendering of a brilliantly destructive cross-examination or some eloquent closing argument which moved a jury to tears and to a verdict in record time.

But, look for a book on openings or direct examinations, listen for the tale of the direct that won the case or the opening which stole the hearts of the jury and you may as well be looking and listening for a symphony orchestra in the middle of the Sahara.

Comparatively speaking, throughout the colorful, yet rather static, history of the last 200 years of trial work, openings

and direct examinations are the work of the Little Red Hen while closings and cross examinations are the banquet upon which all want to feast.

Openings: Persuasion Personified

What is wrong with this view is that it is undeniable that openings are harder to craft – because they come before evidence is actually received – and harder to deliver – because of the rules against "argument." More importantly, however, what is also, only slightly less, undeniable is that openings are the tool favored by "persuaders." In the relative vacuum that is the case, at the point at which the opening is given, persuasion can actually take place because the jurors are wanting to know the truth and are wanting to be able to make up their minds. In my view, closings only act to "attest" to that which is already known, or believed, by the jurors because of all which gone before. But, openings actually "persuade" because they are given at a time when (almost) nothing has gone before. The minds of the jurors are as *tabula rasa* as they are ever going to be during the trial of the case.

Openings allow the advocate to take full advantage of the rules of primacy. And, while there is debate among the writers about which is more important, *primacy* or *recency*, (both of which will be discussed more later) there is no debate that the opening is the advocate's first and best opportunity to move the jurors; emotionally to accept the truth of the story, rationally to accept the logic of the argument, and intuitively to accept that justice can only be done by delivering the verdict for which counsel has asked.

Further, once a juror has made up his mind, once he has actually taken a position, he – like all of us in every other matter in our lives – will do everything possible to avoid having to change his mind or alter his position. The juror does not want to admit he has made a mistake and the longer he holds his opinion, the less likely he is to change it and the more likely he is to rationalize, or deny outright, evidence adduced which is to the contrary.

Therefore, it is incumbent upon the advocate, the persuader, to take all possible steps to persuade the jurors at the earliest possible moment in the trial and, again with due respect to the voir dire, of course, that earliest moment is the opening. The advocate must be prepared to open, (and must open) fully, powerfully and persuasively. She must leave nothing out of the opening which she believes is outcome determinative in the minds of the jurors. She must not leave anything which is, actually, outcome determinative for later. Don't leave anything for "later." This is Normandy. If you can take the beach now, you can take Berlin in time.

To Open or Not to Open

Now, there is plenty of contrary advice out there. In his 1991 book, *Trying Cases to Win*, (Pages 132-136), Herb Stern identifies the substance of the contrary advice:

"Waive opening"
"Consider waiving the opening"
"If you open, be short and concise and don't give your strategy away"
"If you open, be sure to remain fluid and do not commit to a position"
"If you open, do so in a chronological fashion"
"If you open, avoid telling specific facts and don't argue"
"Opening is not the time to confuse the jury with facts that are in dispute"

Before destroying such "wisdom" with the words of Edward Bennet Williams:

> I think the first impression you make on the jury is crucial–you start with voir dire, if you have it. Then you make an opening statement. I don't ever remember passing up that opportunity.... Your aim is to present the best first impression of your case and your client as possible....

In short, never waive an opening.

The Seven Laws of Opening

Having advocated my insistence that an opening be given in every case, this seems the opportune moment to touch briefly upon the Seven Laws of the Opening.

Law 1: Rely on personal advocacy (ethos) during the opening. Jurors believe that the lawyers know what actually happened and they look to the attorneys for the truth. Be the truth giver in the courtroom and understand that your own personal credibility is the key to the acceptance of your theory of the case by the jury. Do everything to protect your own personal credibility and, with every opportunity, try to destroy the personal credibility of your opponent. Never be seen as a trickster or a games player. Craft different ways to convey to the jury your own personal belief in the rightness of your cause without violating the ethical cannons which prohibit your giving a personal opinion regarding the facts.

Law 2: Once you have constructed the theory of the case and chosen your emotional themes, stick to that one central theory. (*Logos*) Repeat the themes. Never waiver from the "principle of the whole;" that one explanation which best reconciles the greatest number of discrepancies. Do not offer the jurors a "smorgasbord" of theories from which to choose. Certainly do not offer theories that actually contradict each other. But, also, do not offer theories which "appear" to contradict each other. Do not cumulate theories – weak ones on top of a stronger one – because you will, in fact, only weaken your chances to have the jury accept your strongest theory. Doing so also hurts your personal credibility.

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As a corollary, your central theory must account for every fact, not just the facts in "your case." First, there is no such thing as "your case" and "their case." To the jury, there is only "the case" and both counsel are held responsible for all the facts. You must account for every indisputable fact (facts beyond change) in "the case" when you form your theory. This is especially true when considering the indisputable "bad facts" of the case. If your theory fails to account for even one indisputable "bad fact," the theory will fail and the jury will find against you. Every "bad fact" must be accounted for in your theory and to "account for" such facts means to make every such fact work <u>for</u> you in support of your theory. Remember the four levels of advocacy regarding indisputable "bad facts:"

> **Level 1:** Is to deny the existence of the fact. Actually, this is not advocacy at all. It is the height of lunacy.
>
> **Level 2:** Is to admit the fact's existence but to never mention it. It is to hide from the fact.
>
> **Level 3:** Is to admit the existence of the fact to the jury and to draw the sting of the fact away from your opponent.
>
> **Level 4:** Is to show that the fact actually supports your theory. It is the highest level of advocacy. It is to use the fact, in an affirmative way, to support your theory.

Be cognizant that errors must be preserved but, do not try the case for the appeal. Try the case to win at trial and to have the verdict stand up on appeal. Give away anything which you cannot keep and every point that you cannot win which is not central to your overarching theory. Try the case on the one or two points upon which everything else turns.

<u>Law 3</u>: Make the case bigger than the facts. Find the emotional appeal, the dominant emotion, of the case **(pathos)**. Move the jury by showing them that the case stands for a principle larger than the facts or by resting on an emotional appeal that will sway them. This is the difference between being legally right and being righteous. This is where learning about the attitudes and views of jurors on voir dire can be used with great aplomb.

<u>Laws 4 and 5</u>: Primacy and Recency. What is said first (*primacy*) and what is said last (*recency*) is remembered best. There is disagreement about whether Primacy or Recency is most important. I come down on the side of Primacy. But, there is very little disagreement, if any, that you must be powerful both when your start <u>and</u> when you finish. What is to be minimized must be left to the middle. Be powerful when you first get up on your hind legs. Don't wind-up. Use a hook, or an emotional theme, to gather the jurors to you from the outset. Make your strongest point out of the box. When you wrap-up, be powerful. Be memorable. Forget about legalisms; talk like a human being, not a lawyer. Forget presumptions – whether of innocence or otherwise – and the burden of proof. Leave law school behind and go back to being the person you were before law school twisted your mind and affected your carefree personality. After all, none of the jurors (most likely) went to law school and are quite happy that they didn't.

<u>Law 6</u>: Frequency. Repeat the themes. Repeat the strong evidence; more than once and in more than one way. Paint mental pictures by presenting the evidence in small, memorable, bites.

<u>Law 7</u>: Vividness. Paint your case with word pictures. Use demonstrative evidence. Bring the case to life in a three-dimensional way. Use the blackboard, a flip chart, overheads, diagrams, power point presentations, computer-generated presentations, physical evidence, photographs, blow-ups of photos or prior testimony, and experiments (only after trying them out before hand, of course). Remember, while evidence must be accurate and authenticated before it is received by the jury, demonstrative aids do not bear those burdens.

Constructing the Opening

One of the key things to remember as you begin the construction of the opening is that organization persuades as much as content. Put another way, it can be said like this: ***The order in which you say what must be said, is as important as what you ultimately say.*** That having been said, it will be easy to describe the two main ways in which openings are given and to show why these methods are unpersuasive.

1. Chronological (story of the event). The chronological narrative is the most common way that lawyers open. It is nothing more than a listing of the facts and events which the lawyer intends to prove and which, by implication, the lawyer believes are important to the jury's understanding of the case. These facts and circumstances are presented in the order in which they occurred.

2. Witness-by-Witness (story of the trial). This method of opening is just what the title says: it is a recitation by the attorney of each person he intends to call, in the order he intends to call them, with an exposition being made after each name concerning what the person to be called will testify to.

Both of these approaches are seriously flawed. If the purpose of the opening is to persuade, then neither of these approaches does that. Additionally, to the extent that an opening argues the party's case in order to be persuasive, neither of the above approaches is, in any sense of the word,

an argument. To note the facts in a blindly chronological order or in the haphazard fashion in which they would come into evidence through the witnesses called at trial is everything short of compelling and no where near persuasive.

3. Grouping facts and positions. The proper approach is for the advocate to group the facts and the evidence in support of particular points to be proven. Then, to take those groupings of facts and evidence and organize them into an order based upon their persuasive force. This is not to say that this method ignores chronology and witnesses. It doesn't. But it uses partial chronologies and the witnesses as footnotes to the credibility of the advocate's argument. The opening attacks and defends points in depth and references the time-frames of the case and those witnesses who play a part in the full explication of each point.

4. Telling a story. Another method of opening is the telling of a story. In this storytelling method of opening, a premium is placed upon describing the emotion of the case and how the actions taken by the people involved were motivated by the emotions they felt at the time they acted. However, admittedly, very few of us are Hans Christian Anderson or one of the Grimm boys and constructing an interesting and compelling story from start to finish is an exercise that is difficult to do. However, within points, all of us can bring together the facts, law and emotion to create the scenario for persuasive argument. Within a point, all of us can show a jury why people did what they did. Using archetypes and universal themes, we are able to construct an argument that maintains a "story line" throughout the course of the opening.

I am a believer in the storytelling method when it is used in connection with the grouping of facts and evidence to make points, as above. I believe that the use of this "hybrid" kind of opening allows for the advocate to bring out the best of herself by forcing the advocate to think about the case from both the head and the heart.

Delivering the Opening

It does little good to describe all that has gone before if the actual giving of the opening is ignored. And, so, a series of important points must be made regarding the delivery of the opening.

Be thoroughly prepared and apparently extemporaneous. Because of the large number of trial advocacy courses which have taken a root-hold in the law schools around the country, it should not be necessary at this point to say this: **Don't read your opening**. But, because of the continued insistence by counsel to violate this rule, it bears repeating: **Don't read your opening**. In fact, it is a bad idea to use scripts of any sort at every stage of the trial. If a topical outline is necessary in order to keep the organizational structure of the opening straight, that is all that should accompany the speaker to the podium.

I also do not espouse the memorization of the opening. It is a much better idea to be thoroughly familiar with the facts of your case and to allow the words to come to you at the moment they are needed. Never form the words that you will use before actually saying them.

When the advocate has his head buried in the words on the page, he loses the opportunity to watch the listener and to pick up those subtle clues which indicate whether the speaker is making progress in his goal of persuasion. Additionally, when one reads or delivers a memorized speech, she does nothing to enhance her personal *ethos* and credibility with the jury.

Part of this is due to the rigid or stilted way the words come out of the speaker's mouth in those situations. Part is due to the speaker's loss of the opportunity to use emotion effectively; and to use any part of his body to convey the story, at all. The ability to use exhibits and/or demonstrative aids is all but nullified when the advocate has his head immersed in the written word or his mind engulfed by the task of remembering what comes next.

It bears repeating that the thoroughly prepared advocate will have the ability to form the words that are needed in the moment that they are needed. It is nothing magical that allows for this. It is the speaker's intellect combined with a consummate knowledge and command of the facts that allows for what can be described as a sort of prepared eloquence.

No wind-ups. Don't start off your opening by talking about how the trial will proceed, or what all the different procedural variables are that the jury might witness. Most likely, the judge has already done that, to some extent. Even if she hasn't, the jury could care less. The juries of today are savvy and informed enough to know what will happen; even if only in a general way. What they want to know is who they are supposed to vote for and why nobody has told them that as yet. Besides, you don't have enough time to explain everything. There are always some variables which don't come up enough to warrant their being mentioned or which you forget about.

Remember the words that followed the initial strikes in Iraq last year: ***Shock and Awe.*** When you first stand up to deliver your opening, use the *ethos/pathos/logos* of the case to bomb your opponent. Do not waste even a single minute warming up the crowd or warming up to them.

Do not delay the warm-up to a later point in your opening. A new trend that I have seen from judging law school mock trial competitions is to drop a bomb at the very beginning of the opening and then, after a one minute barrage, do a six to ten minute warm-up; explaining everything from who the advocate is and where she comes from to a detailed exposition of every phase of the trial. Forget the warm-up entirely.

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Do not bore the jurors. Once you have landed at the beach of Normandy, proceed to take the beach and begin moving toward Berlin.

Length of the opening. After you have shocked and awed the jury and have moved into the very heart of your story or argument, how long should you go on? On this point, I cannot say anything in any better way than Stern. You deliver the opening for exactly as long as you have to in order to make all your points and then you stop. You do not open for a moment longer, nor a moment shorter than it takes you to get the job done.

Use of the podium. This I leave to the discretion of the advocate. There is literature on both sides of this issue. I believe that power can be achieved from behind the podium as well as from other areas of the courtroom. On the other hand, I also believe that the attorney will begin to lose power as he or she approaches the rail of the jury box. The conscientious advocate must give thought to the issues surrounding the use of space in the well of the courtroom as well as the invasion of the personal space of the jurors.

However, whether one uses a podium or not, one must manage "movement" during the opening. Too much movement can be distracting. Standing like a statue behind a box can lead to a kind of group hypnosis. Some movement must take place but all movement should be with a purpose. Move from point A to point B to help in the telling of the story (to indicate another venue, a different date, or a different speaker/point of view) or to obtain and use an exhibit or demonstrative aid, or to accomplish some other purpose which is essential to persuading the jury that this version of the story is the true one.

The use of exhibits and demonstrative aids. This is the earliest moment in which to instill in the jury a sense of confidence in you, and your version of the facts. The way to convey to the jury that their sense of your personal credibility (*ethos*) is not misplaced is to use the exhibits that will be entered into evidence during the trial. Show the gun, read the letters, hold up the prior record, pile up the drugs, show the photos, all of which will be introduced through the witnesses. Give the jury all the corroboration of what you say to them as you can. The exhibits serve as the footnotes to what you are saying. Don't rely solely on your personal credibility if you have the evidence to back-up what you are saying.

The use of illustrative or demonstrative aids in opening is somewhat easier to do because the rules governing the use of such aids is not as strictly regulated as the use of exhibits. Demonstrative aids do not prove things in and of themselves and will never be admitted into evidence. In order to make the opening vivid and, by definition, memorable and, hence, persuasive, use such aids. Draw diagrams on the blackboard, write words on the board, or on an overhead transparency. Even computer generations that are not intended to be introduced may be fair game here and PowerPoint presentations can be modified to allow for the creation of illustrative aids.[2]

Here, the creativity of the advocate is challenged and should be explored in a brainstorming session prior to trial. Counsel should endeavor to use those tools and technologies that exist in order to enhance his or her presentation in order to make the presentation more powerful and persuasive.

Unpleasant facts. Generally, we are loathe to call people liars, cheats, thieves, murderers or to say other unpleasant things about our fellow travelers; at least, most of us were brought up that way. We choose to look for alternative ways to describe people and events which do not tend to shock the hearer or which are designed to make the hearer not dislike us for commenting on the person or event.

I do not take the position that all of our upbringing must be stowed away under counsel table when we are trying a case. Our first instinct should be to search for alternative ways of describing others. However, sometimes it is crucial that we call people, events or things the way they are; however unpleasant that might be. When those situations arise, we must not be afraid of what the jury will think of us. If we expect the jury to say the same thing to us at the end of the trial, we must not be afraid to say it to them during the course of the trial; and, that includes the opening.

The key to knowing when to say something unpleasant or when not to do so is in the analysis of the case. Once you identify what you must have or prove in order to win, then you open on it as strongly as you can.....no matter how unpleasant or uncertain the claim. For example, if you cannot win unless a certain witness is disbelieved, then you must unhesitatingly promise to prove that witness is lying and you must find a way to convey that he is a liar to the jury in the opening.

Opening second. The attorney who opens second is always at a disadvantage. If the plaintiff or prosecutor has opened fully and powerfully, the responding party's counsel can never achieve Level Four-type advocacy because the jury will never hear the lawyer's explanation before they hear the accusation from the other side. Any response to damaging facts will, by necessity, sound like an excuse and not an explanation.

Nonetheless, the advocate who follows a forceful and full opening by her adversary must still open fully and powerfully. She must not "respond." She must give the opening she would have given had she gone first.

In going second, the advocate must ignore the opening of the adversary and develop the points and evidence in the order which is best suited toward persuading the jury of the

rightness of this, alternative, position. He starts with an empty table and begins to construct his model, the better model as far as he is concerned, and picks up the questions and challenges of his opponent as he goes along. He prosecutes his case and does not take defensive positions. He realizes that, because the order of what he has to say is as important as what he says, he must give his opening in the way that it was planned.

Conclusion

In closing, there is really no need to reiterate the main points except to say that one must never underestimate the possibilities for persuasion inherent in the carefully prepared and powerfully delivered opening. The "winner" of the trial is likely to be, as Stern says, "the one that gets there firstest with the mostest." Keeping the principles set forth, above, in mind gives you the chance to do just that.

Mark J. Stanziano
***Stanziano & Wood*, P.S.C.**
114-116 S. Main St.
Somerset, Kentucky 42501
Tel: (606) 678-4230; Fax: (606) 678-8456
E-mail: mark.stanziano@stanzianowood.com

Endnotes:

1. With due apologies to *voir dire*, which is all but gone in federal courts and is fast disappearing in the state courts. If one is lucky enough to be able to conduct meaningful *voir dire*, then that phase is the first opportunity for counsel to establish his personal *ethos* with the triers of fact. However, even where significant *voir dire* is allowed, the opening is the still first opportunity for counsel to argue her client's story of innocence, or reduced culpability with a view toward persuading the jury to believe that counsel is the truth giver in the courtroom.

2. Power point can also be utilized to show exhibits in a rather more persuasive way than simply picking them up and waiving them around. Less frightening, as well, especially when showing a gun or other dangerous weapon. ■

DPA Annual Conference Award Winners

Frank W. Heft, Jr. (R), receiving the Professionalism & Excellence Award from Ernie Lewis (L) and Kent Westberry (Center)

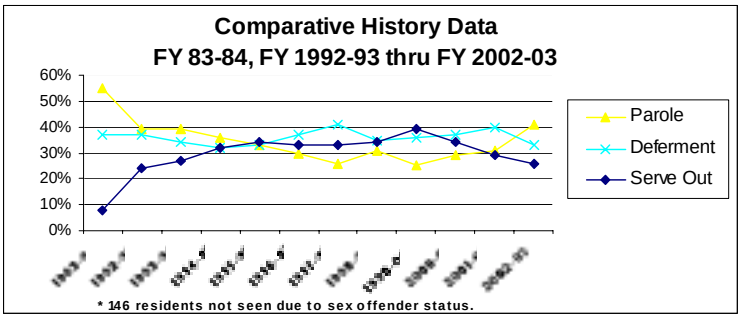
Sara Cunningham accepting the Anthony Lewis Media Award from Ernie Lewis for Louise Taylor

Bette Niemi receiving the Furman Capital Award from Ernie Lewis

PAROLE ELIGIBILITY: THE SAGA CONTINUES

by Robert E. Hubbard, CCDI

In the July 2003 issue of *The Advocate* Dave Norat reviewed the then current parole statistics for fiscal year 2001-2002 and addressed what parole eligibility meant in reality. With truth-in-sentencing laws resulting in harsher sentences, parole eligibility dates are slow in approaching. Further, sex offenders are often precluded from meeting the Board until successful completion of the Sex Offender Treatment Program; some may never meet the Board at all. While violent offenders, with sentences requiring service of 50% or 85% to the Board, see their initial parole review dates as a distant dream. All of those considerations aside, when the opportunity to meet the Board finally arrives, there are no guarantees of what the outcome will be.

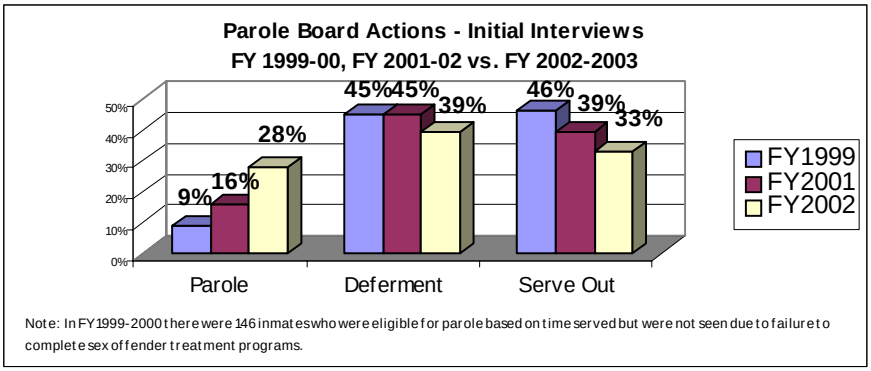


Comparison Data for All Type Interviews Conducted FY 83-84, FY 92-93 thru FY 02-03												
Fiscal Year	1983 1984	1992 1993	1993 1994	1994 1995	1995 1996	1996 1997	1997 1998	1998 1999	*1999 2000	2000 2001	2001 2002	2002 2003
Parole	55%	39%	39%	36%	33%	30%	26%	31%	25%	29%	31%	41%
Deferment	38%	37%	34%	32%	33%	37%	41%	35%	35%	36%	40%	33%
Serve Out	8%	24%	27%	32%	34%	33%	33%	34%	39%	34%	29%	26%
*146 residents not seen by the board due to sex offender status												

Parole eligibility should no longer be considered and treated as a collateral consequence. Parole is a real and direct consequence of the conviction, and with it come considerations and ramifications that must be discussed to properly advise a client. As such, the importance of the practicing attorney's knowledge and understanding of parole cannot be overstated. Indeed, it is often one the most important and initial considerations of the client weighing the advantages of entering a guilty plea. Proper advance information in this area can often mean the difference between effective and ineffective assistance of counsel. Lets take a look at how fiscal year 2002-2003 compares to the past.

The Parole Board conducted 12,680 parole interviews in FY 2002-2003. According to the *Kentucky Parole Board* statistics compiled by the Department of Corrections for fiscal year 2002-2003, 12,680 individuals were interviewed/reviewed by the board for either an initial appearance, a parole revocation review or deferred review. In FY 2001-2002 the Parole Board reviewed only 11,490 offenders. Thus, the figures for FY 2002-2003 represent an increase of 1,190 individuals seen by the Parole Board. Available data reflects that the number of individuals receiving parole in FY 2002-2003 is at the highest level since prior to 1992. This figure also represents a 10% increase in the number of individuals paroled over last fiscal year's numbers. Additionally, deferments are at their lowest level (33%) since 1994 and serve-outs at their lowest level (26%) since 1992.

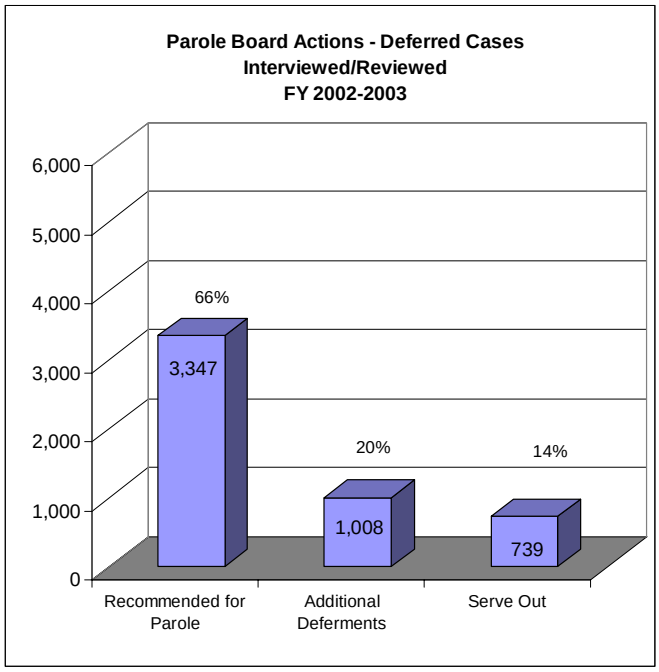
For fiscal year 2002-2003, 5,894 of the 12,680 individuals interviewed by the board were for initial parole hearings. Of that number, 1,668 (28%) individuals were recommended for parole. Of the remaining 72%, 2,281 (39%) were deferred and 1,945 (33%) were ordered to serve out their sentences. In FY 2002-2003 an individual, upon initial review, had an approximate 1 in 3 chance of making parole, compared to a 1 in 6 chance in FY 2001-2002 and a 1 in 11 chance in FY 1999-2000.



Deferrals have a better chance of parole. A deferral is when the offender is told he will have to serve an additional number of months before the Parole Board will again review his case for possible parole. This is also known as a "flop" in the prisons. The Board's statistics show that if an offender was given a deferral(s) the offender will have a better chance

of being paroled at their next appearance before the Board following the deferment. However, an offender may receive more than one deferral before being paroled.

In FY 2002-2003 the Parole Board interviewed 5,094 deferred cases. Of those deferred cases, 3,347 (66%) were recommended for parole, 1,008 (20%) received an additional deferment and 739 (14%) were ordered to serve out. These statistics do not indicate how many deferrals an individual may have received before being granted parole and, unfortunately, there is no information reflecting the average length of a deferral(s) given before parole is granted.

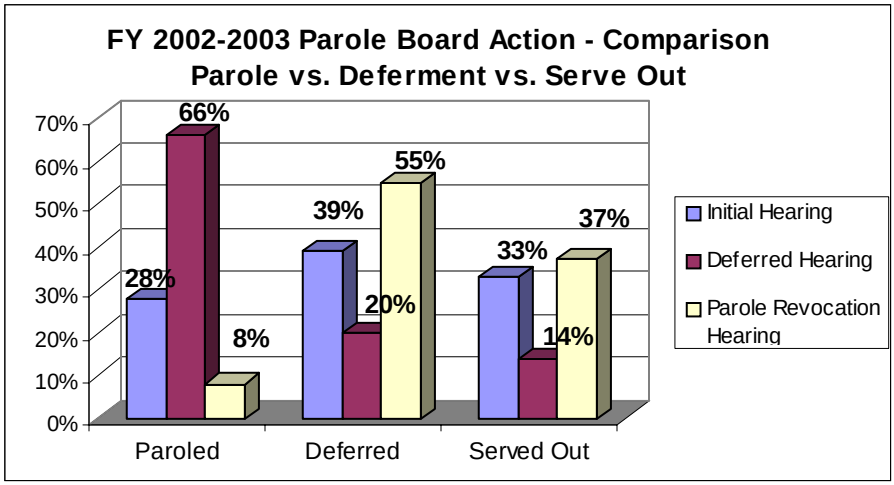


Parole violators are the least likely to be paroled. In FY 2002-2003 the board interviewed 1,692 individuals who had been returned as parole violators. Of that number, 140 (8%) were recommended for parole, 930 (55%) received additional deferments and 622 (37%) received serve-outs. In FY 2001-2002, the Board reviewed 1,789 parole revocation cases. Only 17 individuals (1%) were recommended for parole, with 1,138 (64%) receiving a deferment or an additional deferment and 634 (35%) being ordered to serve out their sentences. As you will note, in FY 2002-2003 serve-outs, following a parole revocation hearing, are on the rise.

Only 2 offenders serving a life sentence were paroled in FY 2001-2002. In FY 2001-2002, 17 offenders serving a life sentence saw the Parole Board. 15 were deferred and 2 were recommended for parole. At the time of this writing no additional statistics related to this area of interest for FY 2002-2003 were available.

Life Sentences Paroled by the Board (1995-2002)			
Fiscal Year	**Paroled**	**Total Interviewed**	**% Paroled**
1994-1995	3	7	0.43%
1995-1996	0	7	0.00%
1996-1997	1	6	0.17%
1997-1998	0	3	0.00%
1998-1999	0	0	0.00%
1999-2000	1	12	0.08%
2000-2001	2	14	0.14%
2001-2002	2	17	0.12%
TOTAL	9	74	0.12%

Parole eligibility: In a nutshell and comparatively speaking. Although an individual will more likely receive a deferment (39%) rather than being paroled (28%) at their initial hearing before the Board, there has been an overall increase in the number of individuals released on parole since FY 2001-2002; 31% in FY 2001-2002 vs. 41% in FY 2002-2003. This overall 10% increase in parole is due to decreases in the overall number of total deferments given and the reduced number of individuals ordered to serve-out their sentence. Also, an individual had a significantly greater chance of making parole coming off of one or more deferments (66%) than making parole at an initial or first hearing (28%). Further, in FY 2002-2003 an individual also had a 7% greater chance of being paroled following revocation than during FY 2001-2002; *i.e.* 1% in FY 2001-2002 vs. 8% in FY 2002-2003.



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Parole Guidelines are in place and working. Since we last reviewed Parole Board statistics within *The Advocate*, the Parole Board has adopted and implemented objective based parole guidelines which are utilized during the decision making process. These guidelines contain both an offense severity index and a risk assessment score that provide the Board with information as to the likelihood of an individual's success on parole. These guidelines further enhance the Board's credibility and accountability and make more consistent the decision-making process. In comparison to the past, FY 2002-2003 statistics indicate we may very well be realizing the intent of these guidelines. Nevertheless, parole is still discretionary.

Can the Board's decision be reconsidered? An individual, whose parole has been revoked, rescinded or denied by deferment or serve-out, may request an appellate review by the Board. The request for reconsideration by the Board must be received within twenty-one (21) days of the date the Board's final disposition is made available to the inmate. If not received within 21 days the request will be denied. The review will only be conducted for one of the following reasons:

- If there is significant new information that was not available at the time of the hearing.
- If there is an allegation of misconduct by a Board member that is substantiated by the record.
- If there is a significant procedural error by a Board member.

Parole eligibility: As time marches on. The Board, consisting of seven diverse members who reach their own decision in each case, gave fewer serve-outs during initial hearings (33%) in FY 2002-2003, less than at any other time since 1992. However, if the individual was returned to prison as a parole violator the likelihood of receiving a serve-out increased 2%, from 35% in FY 2001-2002 to 37% in FY 2002-2003. We may not know the average length of deferments per appearance, or the average number of deferments prior to an individual being paroled, but we can say that in FY 2002-2003 the likelihood of receiving parole was greatly increased both at the time of an initial appearance (28%) and following a deferment (66%). The Board has apparently found a middle ground, paroling individuals after they have served more than the minimum amount of time on a sentence but before they would be released from prison by a serve out. Once the Board releases an individual on parole, the Board may keep the individual on parole for at least one year. KRS 439.342. Further, in some cases, under the authority of KRS 532.043, individuals can be made subject to the supervision of the Board for a period of three (3) years following their release by expiration of sentence or after successful completion of parole. This is an important fact to know when informing your client, victim, the media or community member of parole's reality. ■

Kentucky Parole Board Annual Report
http://www.justice.ky.gov/parolebd/pdf/Annual%20Report2002_2003.pdf

DPA ANNUAL CONFERENCE AWARD WINNERS

Dr. Paul Lucko (l) accepting the Public Advocate's Award From Ernie Lewis (c) and Tom Glover (r) for Kern Alexander and King Alexander, for the Murray State/DPA Partnership & Kentucky Innocence Project report

George Moore receiving the Robert F. Stephens Award from Ernie Lewis for his work on loan assistance

6TH CIRCUIT CASE REVIEW

by Emily Holt

Emily Holt

Warren v. Lewis
365 F.3d 529 (6th Cir. 3/30/04)

6th Circuit reverses district court's grant of writ of habeas corpus. The district court granted a writ of habeas corpus on the ground that the Tennessee state trial court's failure to hold a pre-plea competency hearing violated the 5th and 14th amendment due process requirement that a guilty plea be knowing and voluntary. The Court of Appeals reverses.

Defendant pled guilty to 2 counts intentional murder and 2 consecutive life sentences to escape death penalty. In April 1993, Warren pled guilty to 2 counts of first-degree murder and was sentenced to 2 consecutive life terms. Mr. Warren struck Della May Richter with his truck, killing her, and stabbed Patricia Weaver to death.

Prior to pleading guilty, counsel for Warren had an overall psychological evaluation performed on Warren. Although his IQ of 71 was only 1 point over the upper limit for mental retardation for purposes of imposition of the death penalty, the psychologist determined Warren was competent to stand trial. In order to avoid the death penalty, defense counsel would not only have had to prove Warren's IQ was below 70 but also that he had deficits in adaptive behavior, and the mental retardation had manifested itself during the developmental period or prior to the age of 18. Counsel doubted he would be able to prove these requirements. Not only did Warren have an IQ above 70 and was competent, he had also been employed for many years, supported a wife and children, and had served in the military. Counsel worked out a deal with the state that would protect Warren from the death penalty. Warren discussed the deal with his wife and daughters and decided to enter the guilty pleas. At the plea hearing, the trial court carefully questioned Warren on his decision to plead guilty to 2 first-degree murder counts.

Trial court not required to *sua sponte* order competency hearing where evidence before it does not raise a *"bona fide* doubt" as to defendant's competency. The federal district court held that under *Pate v. Robinson*, 383 U.S. 375, 385 (1966), the trial court was required to conduct a pre-plea competency hearing because the psychological report indicated some mental deficiency. The 6th Circuit disagrees with the district court's characterization of *Pate*. The standard under *Pate* for requiring a competency hearing prior to trial or the taking of a guilty plea is whether evidence raises a "*bona fide* doubt" as to the defendant's competence. The psychologist's report indicated that Warren was competent to stand trial and evidence in the record such as Warren's prior employment and family connections supported this finding. A *sua sponte* pre-guilty plea competency hearing was not required.

Counsel not ineffective for encouraging Warren to plead guilty to life sentences to avoid death penalty. The guilty pleas were knowing and voluntary despite the fact they were entered into out of fear of imposition of the death penalty, and trial counsel was not ineffective for counseling Warren to plead guilty to avoid the death penalty.

> "...Warren had not even attempted to show any prejudice from his counsel's allegedly inadequate performance, and the district court explicitly held that Warren's trial counsel had reviewed the facts that militated against a finding of mental retardation and had reasonably counseled Warren that he risked the imposition of the death penalty if he continued to trial."

Ketchings v. Jackson
365 F.3d 509 (6th Cir. 4/19/04)

Writ of habeas corpus granted where defendant penalized at sentencing for refusing to admit guilt at trial. Ketchings was convicted in Michigan state court of second-degree murder, assault with intent to inflict great bodily harm, intentional discharge of a firearm at a dwelling, and use of a firearm in a felony, as a result of his alleged involvement in a drive-by shooting. Ketchings' sentence for second-degree murder was almost twice the maximum recommended by the Michigan Sentencing Guidelines. On habeas review, the district court granted a conditional writ of habeas corpus on the ground that the trial court improperly considered Ketchings' failure to admit guilt when sentencing Ketchings. The 6th Circuit affirms.

Trial court was not concerned with lack of remorse; court wanted defendant to admit guilt. "A criminal defendant is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty. . . for such silence.'" *quoting Estelle v. Smith*, 451 U.S. 454, 468 (1981). Furthermore, "this guarantee extends to the sentencing phase of trial." The Michigan Court of Appeals held the sentencing court was not taking

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Ketchings' refusal to admit guilt into account, but rather was considering his lack of remorse and its effect on potential rehabilitation. The 6th Circuit, after reviewing a transcript of final sentencing, holds the state court's finding of fact is rebutted by clear and convincing evidence. The trial court, in a lengthy colloquy, repeatedly made statements to Ketchings like "you can't be rehabilitated if you say you didn't do anything." Ironically the trial court said this *immediately after* Ketchings had made a statement expressing his remorse. It was clearly unreasonable for the Michigan appellate court to find the trial court was concerned "only with remorsefulness and not with the admission of guilt." Ketchings is entitled to resentencing before another judge as a remedy for this 5th amendment violation.

Allen v. Yukins
366 F.3d 396 (6th Cir. 4/20/04)

Interpretation of AEDPA statute of limitations where state court opinion results in affirmance of some convictions and reversal and re-trial of others. The 6th Circuit affirms the district court's dismissal of Allen's habeas petition as time-barred by the AEDPA one-year statute of limitations. Allen was convicted of felony murder and assault in Michigan state court. The Michigan Court of Appeals vacated her felony murder conviction, but affirmed the assault conviction in May 1991. Both the state's application for leave to appeal, and Allen's application for leave to cross-appeal, were denied by the Michigan Supreme Court in 1994. On remand to the trial court, Allen pleaded *nolo contendere* to manslaughter. The Michigan Court of Appeals affirmed her manslaughter conviction on September 23, 1997. Allen did not seek leave to appeal the decision to the Michigan Supreme Court.

On September 28, 1998, Allen filed a post-conviction motion in the trial court, seeking resentencing on the assault charge. This motion was denied. Allen then filed a delayed application for leave to appeal, which was denied by both the Michigan Court of Appeals and Supreme Court. On October 30, 2000, the Michigan Supreme Court denied her motion to reconsider. On October 22, 2001, Allen filed her petition for writ of habeas corpus in which she only challenged the conviction and sentence on her assault charge.

Habeas petition untimely under both district court's analysis and defendant's analysis. The AEDPA imposes a one-year statute of limitations on application for writs of habeas corpus. The statute begins to run on the day the judgment becomes final by the conclusion of direct review or the expiration of time for seeking such review. However, AEDPA also provides the statute of limitations is tolled during the time a "properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C.§ 2244(d)(2).

Direct review of Allen's assault conviction arguably could have ended on 2 different dates. First, as the district court concluded, Allen's assault conviction could have become final on November 18, 1997, when her time to appeal the Court of Appeals' affirmance of her manslaughter conviction expired. [The affirmance occurred on September 23, 1997, and 56 days later, on November 18, 1997, the time to appeal to the Michigan Supreme Court expired. *See* Michigan Court Rule 7.302(C)(2).] Second, as Allen argued, the assault conviction could have been final on October 14, 1994, when the Michigan Supreme Court denied her motion for leave to cross-appeal the Court of Appeals' decision affirming her assault conviction. [Allen apparently argues for an earlier date to bolster her alternate claim that she is entitled to equitable tolling.]

". . .[W]hether the direct-review process concluded when the Michigan Court of Appeals affirmed Allen's assault conviction, or when that court subsequently affirmed her manslaughter conviction, the result is the same: Allen's petition was untimely. We therefore will assume without deciding that the district court's analysis was correct, and that Allen's conviction became final on November 18, 1997." Allen's petition was untimely under the earlier date of October 14, 1994, because that was prior to AEDPA, and pursuant to the statutory grace period, *Austin v. Mitchell*, 200 F.3d 391, 393 (6th Cir. 1999), her time to file a habeas petition expired on April 24, 1997, 4 years and 6 months prior to the date the petition was actually filed. If her conviction became final on the later date of November 18, 1997, the statute of limitations would have begun running on November 19, 1997. The period would have been tolled from the day Allen filed her motion for relief from judgment, September 28, 1998, until the date the Michigan Supreme Court denied Allen's motion for reconsideration, October 30, 2000. After this motion was denied, the time period would have continued to have been tolled during the 90 days Allen could have sought U.S. Supreme Court review. That 90-day period would have expired on January 29, 2001. Allen would have had 51 days remaining of the statutory period so her habeas petition would have had to have been filed March 20, 2001. Allen did not file her petition until October 22, 2001, some 7 months later.

State post-conviction motion claiming ineffective assistance of appellate counsel not part of direct review process and, even if it was, would only toll the statute of limitations, not restart it. A state post-conviction motion claiming ineffective assistance of appellate counsel is not part of the state direct-review process in Michigan. In fact, it is only part of the state direct-review process in Ohio, due to an odd provision in Ohio state law. *Payton v. Brigano*, 256 F.3d 405, 409 n.4 (6th Cir. 2001). Furthermore even if this was an Ohio case, a state post-conviction motion claiming ineffective assistance of appellate counsel only tolls—it does not restart—the AEDPA statute of limitations. *McClendon v. Sherman*, 329 F.3d 490, 494 (6th Cir. 2003).

Defendant not entitled to equitable tolling; prejudice to defendant not even considered since no *Dunlap* factor justifies equitable tolling. Allen is not entitled to equitable tolling under *Dunlap v. U.S.*, 250 F.3d 1001, 1007 (6th Cir.), *cert. denied*, 122 S.Ct. 649 (2001). First, as to lack of actual or constructive notice of the filing requirement, *Austin v. Mitchell, supra*, and the AEDPA, put Allen on notice of the filing deadline. "[I]gnorance of the law alone is not sufficient to warrant equitable tolling." *Rose v. Dole*, 945 F.2d 1331, 1335 (6th Cir. 1991). Second, as to Allen's diligence in pursuing her rights, under the district court's determination of the date of finality of state direct review, her petition was 7 months late, and using Allen's own date, the petition was 4 years and 6 months late. "The length of her delay actually suggests that equitable tolling is not appropriate in this case." Furthermore Allen was not misled by her attorney who, in response to Allen's query about federal remedies, stated he was "not an expert" on federal habeas law and informed her, correctly, that she would have to exhaust state court remedies first. The Court declines to consider whether Allen was prejudiced since she failed to demonstrate any factor that justifies tolling. *Vroman v. Brigano*, 346 F.3d 598, 605 (6th Cir. 2003).

Court declines to adopt "actual innocence" exception to AEDPA statute of limitations. Allen's claim of actual innocence does not allow her to circumvent the AEDPA statute of limitations. Although the 6th Circuit declines to adopt an actual innocence exception, the Court makes reference to an unpublished opinion that lists the likely requirements of an exception should the Court ever adopt it. In *Whalen v. Randle*, 2002 WL 409113 (6th Cir. 3/12/02)(unpublished opinion), the Court stated it would require the petitioner to "show that it is more likely than not that no reasonable juror would have found [her] guilty beyond a reasonable doubt in light of all the evidence." Furthermore the petitioner must produce evidence of innocence "so strong that the court can not have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error." These requirements have not been met in the instant case. "A reasonable juror could easily find beyond a reasonable doubt that Allen is guilty of assault."

Bigelow v. Williams
2004 WL 1040334 (6th Cir. 5/10/04)

Trial counsel may have been ineffective in failing to further investigate alibi defense. The 6th Circuit remands this case to the district court for a determination whether Bigleow's trial counsel, Peter Rost, was ineffective when he failed to investigate Bigelow's alibi defense. Bigelow was convicted in an Ohio state court of kidnapping, assault, and arson, for alleged involvement in an attack on a woman in Toledo. Bigelow insisted, however, that he could not have been involved because he was in Columbus, Ohio, 150 miles away at the time.

Counsel had investigated Bigelow's claim of an alibi to some extent. Rost investigated Bigelow's claim prior to trial, and his efforts bore no fruit. Rost could not be said to be ineffective until 4 days prior to trial when Vernon Greenlee, an Orkin Pest Control employee, called Rost and told him he could place Bigelow in Columbus on the day of the crime. Rost subpoenaed Greenlee and another Orkin employee, John Laughner, to testify at trial. Laughner testified that Greenlee worked at the home of Gary Chasen for 2 consecutive days, one of which was the day of the Toledo attack. Greenlee testified that on the day of the assault Bigelow was at the Chasen home all day and helped him move items from the garage so Greenlee could treat it for termites. The only evidence offered by the state was the victim's identification of him in a line-up and at trial, and testimony from an eyewitness who claimed to see the Bigelow, from the back and side, running from the scene.

When one witness who supported the alibi defense was uncovered, counsel had a duty to conduct additional investigation to look for more witnesses. The 6th Circuit finds fault with the fact that Rost failed to conduct any additional investigation after Greenlee contacted him. "Once Greenlee appeared, Rost had ample reasons to re-commit himself to finding additional alibi witnesses in the Columbus area—whether by asking for a postponement of the trial, by hiring an investigator or by traveling to Columbus himself to talk firsthand to the other people that might have been working at the same house as Greenlee (and apparently Bigelow) on June 17th. Had Rost pursued any of these options, he likely would have identified three other witnesses, all of whom have since come forward to testify that they saw Bigelow in Columbus on the day of the attack and none of whom had a prior relationship with Bigelow (or any other reason to be untruthful)."

The three new witnesses were all employees of a landscaping company that had been at the Chasen home on the day of the Toledo attack and had had extended encounters with Bigelow.

Value of counsel's trial strategy is proportionate to investigation conducted. The Court remands the case to the district court for consideration of whether failure to conduct additional investigation constituted ineffective assistance of counsel. "[T]he respect that attorneys' strategic decisions in a criminal trial will receive is proportionate to the extent of the investigation they in fact conducted." *Strickland v. Washington*, 466 U.S. 668, 691 (1984). The district court must determine whether Rost's performance was adequate under the circumstances and whether the result would have been different if Rost had further investigated the alibi defense after Greenlee's phone call and located the employees of the landscaping company. *Strickland*, 466 U.S. at 687. In light of the weak evidence offered by the state, "three other witnesses, who like Greenlee did not previously know

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Bigelow and accordingly had no ax to grind in testifying on his behalf, would have aided the defense. . . In a case involving identification and identification alone, it is not easy to imagine a defense lawyer who would pass on the chance to bolster the defense with evidence of this sort—particularly since eyewitness evidence is 'precisely the sort of evidence that an alibi defense refutes best.'" *quoting Griffin v. Warden, Maryland Corr. Adj. Ctr.*, 970 F.2d 1355, 1359 (4th Cir. 1992).

U.S. v. Beverly et al.
2004 WL 1057856 (6th Cir. 5/12/04)

Mitochondrial deoxyribonucleic acid (mtDNA) forensic evidence is admissible in 6th Circuit. This case involves a series of bank robberies that occurred in Ohio between September 1994 and November 1995. Co-defendants Beverly, Turns, and Crockett were tried together and convicted of various armed robbery and firearm offenses. While the 6th Circuit addresses many issues in the opinion, the Court's holding that expert testimony regarding mitochondrial deoxyribonucleic acid (mtDNA) is admissible is most important to state court practitioners.

When tested, a hair found at the scene of one of the back robberies was determined to have the same pattern as Beverly's. Beverly argues the government expert should only have been allowed to testify that Beverly could not be excluded as the source of the sample in question, not that the hair matched his own.

Every cell contains 2 types of DNA: nuclear DNA, found in the nucleus of the cell and mitochondrial DNA, found outside the nucleus in the mitochondrion. Nuclear DNA evidence as a forensic tool is accepted in the scientific and legal communities. Use of mitochondrial DNA evidence as a forensic tool is on the rise. While there are some advantages to mitochondrial DNA testing, like the fact that there is a greater amount of mtDNA in a cell to be extracted by a technician and used for testing, "mtDNA is not as precise an identifier as nuclear DNA." In the case of nuclear DNA, half is inherited from the mother and half from the father, and each individual, with the exception of identical twins, has a unique profile. MtDNA, on the other hand, is inherited only from the mother and all maternal relatives share the same mtDNA profile unless a mutation has occurred. "MtDNA typing has been said to be a test of exclusion, rather than one of identification." *See U.S. v. Coleman*, 202 F.Supp.2d 962, 965 (E.D. Mo. 2002), for excellent discussion of mtDNA testing and evidence. MtDNA testing has been admitted into evidence by several state courts, including courts in North Carolina, Tennessee, South Carolina, New York, and Maryland.

In the case at bar, the trial court held an extensive hearing on the admissibility of mtDNA and, applying *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), held the evidence was admissible. The Court of Appeals affirms this finding. While Dr. Melton's lab was not yet accredited by the American Society of Crime Laboratory Directors, that was because at the time of trial it had not been in operation for the requisite length of time, but would be soon, and Dr. Melton's own credentials are impeccable. Furthermore while both Dr. Melton and Dr. Kessis, Beverly's expert, testified that contamination sometimes results from the procedures used to test mtDNA, there was no evidence contamination occurred in this case. Finally the Court rejected Beverly's argument that the evidence was more prejudicial than probative. "Beverly argued that the jury would associate mitochondrial DNA analysis with nuclear DNA analysis and give it the same value, in terms of its ability to 'fingerprint' a suspect. The district court, however, decided that this issue was more appropriately dealt with through a vigorous cross-examination, and in fact that was exactly what occurred at trial." The evidence was helpful to the jury, and "the scientific basis for the use of such DNA is well-established." The Court also noted:

> "It was made clear to the jury that this type of evidence could not identify individuals with the precision of conventional DNA analysis. Nevertheless, any particular mtDNA pattern is sufficiently rare, especially when there is no contention that the real culprit might have been a matrilineal relative of the defendant, that it certainly meets the standard for probative evidence: 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.' FRE 401. The statistical evidence at trial showed that, at most, less than 1% of the population would be expected to have this mtDNA pattern. . . It would be unlikely to find a match between Beverly's hair and the hair of a random individual. The testimony was that, with a high degree of confidence, less than one percent of the population could be expected to have the same pattern as that of the hair recovered from the bank robbery site, and that Beverly did have the same pattern, and thus could not be excluded as the source of the hair. Finding Beverly's mtDNA at the crime scene is essentially equivalent to finding that the last two digits of a license plate of a car owned by defendant matched the last two numbers of a license plate of a getaway car. It would be some evidence—not conclusive, but certainly admissible. We find the same here."

Quintero v. Bell
2004 WL 1146119 (6th Cir. 5/24/04)

6th Circuit reinstates original *Quintero v. Bell* opinion after remand from the U.S. Supreme Court for reconsideration in light of *Bell v. Cone*. In a prior opinion, *Quintero v. Bell*, 256 F.3d 409 (6th Cir. 2001), the Court affirmed the district court's granting of a writ on the ground that Quintero's trial counsel was ineffective when he failed to object to the presence of 7 jurors who had served on juries that convicted his co-conspirators. The state had appealed to the U.S. Supreme Court which granted certiorari, *Bell v. Quintero*, 535 U.S. 1109 (2002), and vacated the opinion and remanded the case back to the 6th Circuit for reconsideration in light of *Bell v. Cone*, 535 U.S. 685 (2002). The 6th Circuit holds *Cone* is distinguishable and reinstates its original opinion.

In *Cone*, the 6th Circuit held that in a death penalty case where no mitigation evidence was introduced or penalty phase closing statement was made, the petitioner was entitled to a presumption of prejudice. The Court of Appeals relied on *U.S. v. Cronic*, 466 U.S. 648, 659 (1984), a case where the U.S. Supreme Court held that for 6th amendment purposes, a presumption of prejudice is required where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." The U.S. Supreme Court granted certiorari in *Cone* and reversed, holding a presumption of prejudice is not appropriate where defense counsel only fails to oppose the prosecution in a portion of the sentencing proceeding as a whole. *Cone*, 535 U.S. at 697.

Presumption of prejudice where trial counsel allowed 7 jurors who convicted co-defendants to hear the defendant's case. The Court of Appeals concludes this case is different because "counsel's acquiescence in allowing seven jurors who had convicted petitioner's co-conspirators to sit in judgment of his case surely amounted to an abandonment of 'meaningful adversarial testing' *throughout* the proceeding, making the 'adversary process itself presumptively unreliable.'" (emphasis in original) *quoting Cronic*, 466 U.S. at 659. The original *Bell v. Quintero* opinion that has now been reinstated was reviewed in this column in the September, 2001 *Advocate*. ■

JUDGE CENSURED, FAILED TO TELL ACCUSED OF RIGHT TO COUNSEL

6/19/2004. Associated Press. A King County District Court judge has been censured for failing to tell defendants they had a right to counsel.

One of the cases the state Commission on Judicial Conduct found particularly egregious involved a 19-year-old girl sentenced to a year in jail for possessing alcohol as a minor.

District Court Judge Mary Ann Ottinger agreed to the censure, which requires her to undergo judicial training and counseling at her own expense.

Ottinger's lawyer, Anne Bremner, said her client has "always been a highly respected judge and has served with distinction for many years."

But the censure order, handed down on Friday, states that "the nature of the violations cannot be overstated" and that the practice was "routine."

In one case, Ottinger allowed a teenage girl who had no prior criminal record to plead guilty to an alcohol possession charge without any legal advice. The law requires judges to tell defendants about consequences of a guilty plea and that they have a right to an attorney, among other things.

The commission found that Ottinger failed to tell the girl any of this, according to the censure.

Initially, Ottinger issued a suspended sentence that required the girl to get an alcohol evaluation and stay out of trouble. But when the girl repeatedly failed to do so and failed to appear in court, Ottinger sentenced her to a year in jail.

The girl spent more than two months behind bars before defense lawyers heard about the case and persuaded a Superior Court judge to release her. Prosecutors did not oppose the release.

Defense lawyers say Ottinger isn't the only King County judge who fails to tell defendants about their rights.

"It's very common," said Robert C. Boruchowitz, director of The Defender Association, an office that provides public defense services to King County. "They figure people will plead guilty and get it over with."

Ottinger's censure also rebuked her for secretly providing legal advice to the city of Issaquah, including ghostwriting correspondence. The commission also said she advised the city to sue King County in a dispute over the reorganization of the District Court.

In a separate matter, the commission reprimanded Auburn Municipal Court Judge Patrick R. Burns for writing "NTG" on the bottom of hundreds of defendants' court paperwork. The reprimand said lawyers widely believed the initials stood for "Nail This Guy," which would create the appearance that he was treating those defendants unfairly.

Burns said the initials simply reminded him to "Note This Guy (or Gal)." The reprimand required him to take judicial ethics training. ■

For more information regarding the right to an attorney in misdemeaner proceedings see Robert C. Boruchowitz's article, "How to Deal with the Denial of Counsel in Misdemeanor Cases Post-*Shelton*," in *The Advocate*, Vol. 26, Issue 1, January 2004.

CAPITAL CASE REVIEW

by Susan Jackson Balliet

U.S. SUPREME COURT

***Nelson v. Campbell*, 2004 WL 1144374**

J. O'Connor, writing for a unanimous Court

Okay to challenge method of execution via 42 U.S.C. § 1983. The Anti-Terrorism and Effective Death Penalty Act (AEDPA) generally limits a convicted prisoner to a single federal habeas challenge to the conviction or the duration of the sentence. Nelson had already litigated (and lost) his federal habeas action when, three days before his execution, he filed a civil rights action under 42 U.S.C. § 1983. In his 1983 action, Nelson –whose veins were damaged and largely inaccessible from years of drug abuse— challenged the "cut-down" procedure Alabama proposed to use in order to access his veins for a lethal injection. He requested a stay.

This was not a "successor" habeas in disguise. Alabama argued that the federal courts had no jurisdiction because Nelson's 1983 action was an unauthorized, forbidden "successor" habeas under 28 U.S.C. 2244(b). Both the district court and the 11th Circuit agreed, leaving Nelson without recourse to challenge the constitutionality of "cut-down."

The U.S. Supreme Court here reverses, holding that this was *not* a successor habeas action in disguise, and that 42 U.S.C. is an appropriate vehicle for a challenge to the "cut-down" method of execution. The Court holds that Nelson's challenge was not an unauthorized attempt at bringing a second habeas, because Nelson did not challenge either his conviction or the fact that he was to be executed. Nelson's complaint was more like a "conditions of confinement" challenge, which falls outside the "core" of habeas. Requesting a stay did not transform Nelson's 1983 action into a successor habeas, because Nelson sought to enjoin the "cut-down," not the execution.

Court does not reach question whether "cut-down" is cruel and unusual. The Court did not reach, and did not decide whether the cut-down procedure is cruel and unusual punishment under the 8th Amendment. However, the Court remanded the case to district court to decide whether the cut-down procedure is *necessary*. If the district court determines that cut-down is necessary, then it will have to decide if cut-down is cruel and unusual. In his 1983 action, Nelson had produced expert opinion that the cut-down procedure is dangerous and antiquated, that it requires deep sedation, and that safer and less invasive means of venous access exist.

The stay of execution Nelson obtained with his 1983 suit had expired by the time of the U.S. Supreme Court's decision. The Court noted that if Nelson seeks to enjoin a new execution date while his 1983 action is pending on remand, the district court will have to decide if such a request "properly sounds in habeas." If so, according to the Court, Nelson will need to seek permission for a second habeas. Moreover, such a request would be denied, because Nelson could not show that but for a "cut-down" 8th Amendment violation, no reasonable fact finder would have found him guilty of the underlying offense.

SIXTH CIRCUIT COURT OF APPEALS

***Stumpf v. Mitchell*, 2004 WL 894991 (6th Cir. Ohio)**
(decided April 28, 2004)
(THIS OPINION IS NOT FINAL)

Daughtrey, writing, with Moore joining Boggs in dissent

With no deal on the table, Stumpf pled guilty in 1984 to capital murder, aggravated by the fact that it was committed to escape detection for other offenses. Under Ohio law, Stumpf's guilty plea entitled him to an evidentiary hearing before a three-judge panel to establish a factual basis for the plea. The panel found a factual basis, found insufficient mitigating evidence to spare Stumpf, and imposed the death penalty.

This is a pre-AEDPA case, *i.e.*, it was filed in federal court before the effective date of the Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA). Therefore, Stumpf's claims are evaluated under 28 U.S.C. § 2254(d) as it existed prior to the AEDPA. This means that the district court's fact-findings are reviewed for clear error, and the state's fact-findings are rebutted only by clear and convincing evidence. Questions of law, and mixed questions of law and fact are reviewed *de novo*. *McQueen v. Scroggy*, 99 F.3d 1302 (6th Cir. 1996)

The 6th Circuit concludes that the district court should have granted relief to Stumpf on two grounds, 1) his guilty plea was unknowing and involuntary because he was manifestly unaware that specific intent was an element of the crime to which he pled guilty, and 2) the state violated Stumpf's Due Process rights by deliberately securing convictions of both Stumpf and his accomplice Wesley for the same crime, using inconsistent theories.

Stumpf's plea was unknowing and involuntary. Stumpf and his accomplice Wesley both entered the home of Norman and Mary Jane Stout with the intention to commit a robbery. In the course of this crime, Mrs. Stout was shot dead. Stumpf and Wesley each accused the other of being the shooter.

Stumpf's case came to trial first, because Wesley required extraditing from Texas. Stumpf pled guilty. His guilty plea is here held to be unknowing and involuntary for numerous reasons, which boil down to the Court's determination that Stumpf (and possibly also his counsel) was unaware that specific intent was an element of murder. The Court relies on *Boykin v. Alabama*, 395 U.S. 238, 243 n. 5 (1969) ("…because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.")

It should be noted that Stumpf did not have to be the shooter in order for the trial court to find he intended Mrs. Stout's death. However, the Court points out that the state's theory of guilt relied completely on Stumpf being the principal offender. No other evidence of Stumpf's intent was presented. And under Ohio law, specific intent may not be inferred solely from the fact of participation in a felony murder.

The Court's Opinion contains a lengthy excerpt from the plea colloquy, which the Court uses to illustrate the "confusion" surrounding Stumpf's plea. The Court notes that Stumpf "continually professed his innocence of the actual shooting both during and after the guilty plea." In addition, at the factual basis hearing, Stumpf's lawyers argued Stumpf was not the shooter, belying their assurances that they had themselves understood and explained to Stumpf all the elements of murder, including specific intent. The Court criticizes the state trial court for ignoring broad clues that Stumpf was confused regarding the element of intent, because he continually asserted his expectation that he would be allowed to put on evidence of his version of the crime.

The Court points to the fact that in exchange for pleading guilty, Stumpf received "absolutely no benefit in the form of a reduction in possible sentence." Another fact, not expressly relied on, was that Stumpf had "a low IQ" and had been found to be "mentally and emotionally immature."

Inconsistent theories to convict Stumpf and his accomplice violated due process. In an "issue of first impression in this court," the 6th Circuit joins the 8th, 9th, and 11th Circuits[1] in holding that the use of inconsistent, irreconcilable theories to convict two defendants for the same crime is a due process violation.

The state argued at Stumpf's factual basis hearing that Stumpf was the shooter. Later, at Wesley's trial, the state introduced snitch evidence that Wesley had confessed that to being the shooter. The state argued that the snitch's testimony was new evidence, because it came to light after Stumpf pled guilty. However, the state had an opportunity to correct its use of conflicting theories, because Stumpf filed a timely motion for new trial when he learned the state was now relying on a theory that Wesley was the shooter.

Finding a reasonable probability that the prosecutor's use of inconsistent, irreconcilable theories rendered the conviction unreliable, the Court sets both Stumpf's plea and his sentence aside, remanding for a new trial.

In dissent, Judge Boggs distinguishes all three sister circuit opinions relied on by the majority, pointing out that the key factor in all these cases is prosecutorial misconduct, deliberate presentation of false evidence, manipulation of evidence. According to Boggs, Stumpf's case involves no similar misconduct. Finally, Boggs warns that following the decision in *Stumpf*, prosecutors in the future would be well advised not only to eschew reliance upon potentially contradictory evidence in later proceedings, but also to prevent any other prosecutor from doing so.

Spirko v. Mitchell,
2004 WL 1085179 (6th Circuit, Ohio)
(Decided May 17, 2004)
(THIS OPINION IS NOT FINAL)

J. Batchelder, writing (with Daughtrey joining)
J. Gilman, dissenting

Applying the pre-AEDPA standard of review (set out above in the discussion of *Stumpf v. Mitchell*), the Court agrees with all the district court's findings and conclusions. Only Spirko's *Brady* claims, "although ultimately meritless," receive attention. *Brady v. Maryland*, 373 U.S. 83 (1963) (suppression by the prosecution of evidence favorable to the accused violates due process).

The body of Elgin, Ohio postmistress Betty Mottinger was discovered the morning of August 9, 1982. After two months of an extensive police investigation, John Spirko - in jail on unrelated charges - offered to assist in the Mottinger case in exchange for help on his pending charges. Spirko gave a series of differing accounts of the Mottinger murder, providing numerous details that only a person familiar with the crime could have known, matters that had not been made public. In one of his stories, Spirko identified his friend Delaney Gibson as the killer and the source of Spirko's information on the crime.

Prosecution theory: Spirko and Gibson acted in concert. At trial the prosecution theory was that Spirko and Gibson acted together in killing Mottinger. A witness identified a picture of a clean-cut Gibson in a photo array as a man she had seen getting out of a car in front of the post office that

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morning at 8:30 a.m. Another witness identified Spirko as the man he had seen that morning, but with only 70% accuracy. There was no forensic evidence.

State withholds relevant photos and receipt. Gibson denied any involvement, and claimed he was employed as a migrant worker in North Carolina at the time of the crime. His crew chief confirmed Gibson was in his employ during the time period in question, but said Gibson was absent from work three or four days. Gibson's wife Margie provided the police pictures taken in August 1982 showing Gibson with a full beard, and a receipt from an automotive store in North Carolina issued on August 7, 1982 to "Jim Gibson," one of Delaney Gibson's aliases. Gibson's in-laws, the Bentleys, provided additional pictures and receipts from a motel dated August 8, 1982 from Newport, Tennessee. None of the photos or receipts were provided to Spirko in discovery.

Spirko claimed the above evidence demonstrated that Gibson could not have been in Elgin, Ohio on the morning of August 9, 1982, and that on that day Gibson had a full beard, and was not clean shaven. This evidence undercut the state's theory, and an eyewitness identification. Spirko urged that the failure to turn it over violated *Brady*.

Withheld evidence was not material. The Court finds that Spirko had received memoranda of interviews with Gibson and was on notice that Delaney Gibson had been in North Carolina on the day before the murder, plus the identity and location of witnesses to Gibson's whereabouts on that day. Because Spirko was aware of the "essential facts" that would enable him to take advantage of the exculpatory evidence, the *Brady* rule did not apply.

Additionally, the Court finds that Spirko failed to demonstrate that the withheld evidence was favorable to him, and thus failed to demonstrate the prejudice required to support a finding that the evidence was material. The withheld evidence neither contradicted nor undermined the state's theory of the crime, because the state's case against Spirko did not rest on the participation of Gibson. The state's case depended principally on Spirko's own statements demonstrating intimate knowledge of facts that only one who had committed the crime would be likely to know. The Court points out that in fact the withheld evidence hurt Spirko, because if Gibson did not participate in the crime - and thus Spirko did not learn details of the crime from Gibson - then "from whence did all of that detail come?"

In dissent, Judge Gilman emphasizes that the case against Spirko was far from overwhelming, based as it was on 1) an eyewitness who was 100% sure she saw Delaney Gibson at the post office when the postmistress was abducted, 2) another eyewitness who was 70% sure Spirko was also at the scene, and 3) Spirko's knowledge of factual details not known to the general public.

The state intentionally withheld the photos and receipts, and Spirko could **not** have obtained them through other means. Spirko's trial counsel signed affidavits stating they doubted the credibility of Gibson's alibi and had therefore failed to pursue that line of defense. If the prosecution had fulfilled its *Brady* obligation, Spirko would not have testified to Gibson's alleged involvement, and would have undermined one eyewitness's testimony. Finally, Spirko could have defended on the grounds that he could have obtained the information from someone else who was involved in the crime, or from the investigators themselves.

For all these reasons, Judge Gilman would remand for an evidentiary hearing on Spirko's *Brady* claims.

KENTUCKY SUPREME COURT

***St. Clair v. Commonwealth*, 2003 WL 314613**
(As Modified on 2-23-2004)
(THIS OPINION IS NOT FINAL)

Death sentence reversed: failure to instruct jury on LWOP. In this direct appeal out of Bullitt County, the Court affirms St. Clair's murder conviction, but reverses his death sentence and remands for a new capital sentencing trial. Despite counsel's assertion that St. Clair consented to the 1998 amendments to KRS 532.030, the trial court refused to instruct the jury to consider life without possibility of parole (LWOP). The Kentucky Supreme Court reverses under *Commonwealth v. Phon*, Ky., 17 S.W.3d 106 (2000), and remands.

No speedy trial violation. St. Clair was not denied a speedy trial, even though this was an Interstate Agreement on Detainers (IAD) case under KRS 440.450, and there was a six year lapse between the indictment in 1992 and the trial in 1998. The Court holds that the IAD's 120-day limitation did not apply, because instead of the IAD, Kentucky used an executive agreement authorized under KRS 440.200(1) to obtain custody of St. Clair. In addition, there was no evidence that Kentucky ever filed a detainer in Oklahoma.

Motion for psychiatrist "too conclusory." The only details defense counsel supplied in St. Clair's motion for funds for an independent psychiatrist were the fact St. Clair had previously committed four murders in Oklahoma, and the fact counsel had spoken with a psychologist in Oklahoma who had "done the work-up" on St. Clair. This was not enough. Counsel should have provided the substance of the conversation with the psychologist, and a reason why a psychiatric work-up was needed. No "psychiatric fishing expedition at public expense" is allowed.

"Record of conviction" aggravator expanded to cover St. Clair. St. Clair was not death eligible under the law as it existed at the time of this crime, or at the time he was tried. He did not have a "prior record of conviction for a capital

offense," because sentence had not been entered in two of his Oklahoma murder cases, and he had yet to stand trial for the others. In order to uphold St. Clair's death sentence, the Court partially overrules *Thompson v. Commonwealth*, Ky., 862 S.W.2d 871 (1993) (interpreting "conviction" in KRS 532.025(2)(a)(1) to mean "final judgment"). Referencing "popular demand," the Court here expands the meaning of "conviction" to include its "popular" meaning: any finding of guilt by plea or verdict. The Court applies this new meaning to St. Clair retroactively to uphold his death sentence. Needless to say, St. Clair raises due process and ex post facto arguments in current rehearing proceedings.

***Schweinefuss v. Commonwealth* is overruled.** Although the better practice is to admonish prospective jurors not to read about the case in the media, RCr 9.70 requires this admonition only after the jury has been selected and sworn. To the extent *Schweinefuss v. Commonwealth*, Ky., 395 S.W.2d 370, 375 (1965) states to the contrary, it is overruled.

Hearsay is sufficient to support showing of witness unavailability. Retreating from its holding in *Marshall v. Commonwealth*, Ky., 60 S.W.3d 513 (2001), the Court holds that a trial court *can* rely on bare assurances by the Commonwealth regarding the unavailability of a witness in order to admit into evidence a video deposition. Keller (joined by Johnstone and Stumbo) dissents on this issue.

Cooper dissent: St. Clair not eligible for death. Justice Cooper concurs in affirming guilt and reversing for a new penalty phase. He dissents on the ground that St. Clair is not eligible for the death penalty. Cooper agrees that *Thompson* was wrongly decided and should be overruled. However, he parts way with the majority in his conviction that the Due Process Clauses of the 5th and 14th Amendments "preclude us from retroactively applying our decision" to St. Clair's case.

Also addressed: failure to include aggravators in indictment; attorney client access; jury questionnaire; prior bad acts; *Brady* evidence; evidence of co-indictee's mental problems; juror cause challenges; allocation of peremptories; former testimony; telephone records; discovery regarding potential witness; trooper's identification testimony; photographs; fingerprints; discovery; cross-examination; victim sympathy; guilt phase closing; KSP lapel pins; public trial; defendant's presence; sequestration; decision not to introduce mitigation; evidence of prior convictions.

***Soto v. Commonwealth*, 2004 WL 867447**
(decided April 22, 2004)
(THIS OPINION IS NOT FINAL)

J. Keller dissenting (with Stumbo). The Kentucky Supreme Court upholds Miguel Soto's Oldham County conviction and death sentence for the murder of his former mother and father-in-law, attempted murder of his ex-wife, wanton endangerment of his daughter, burglary and tampering with the evidence.

Notice pleading does not require aggravators in the indictment. Under RCr 6.10(2) the Commonwealth must plead only enough detail to give the defendant notice of the charges against him. Soto's indictment stated that he was charged with two counts of "capital murder," and cited KRS 507.020 (murder) and KRS 532.025(2) (aggravating circumstances). Thirty-eight days after the indictment, the Commonwealth filed official notice it would seek the death penalty.

The Court distinguishes *Jones v. United States*, 526 U.S. 227 (1999)(6A requires that facts triggering a higher penalty must be charged in the indictment); *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (other than a prior conviction, 14A requires any fact that increases the penalty beyond that statutorily prescribed must be submitted to jury); and *Ring v. Arizona*, 536 U.S. 584 (2002) (aggravating factors must be determined by jury). The Court states, "…we are not bound by federal law on this issue because, as noted in *Apprendi* … the Fourteenth Amendment has never been construed to incorporate against the states "the Fifth Amendment right to 'presentment or indictment by a Grand Jury." The Court also relies on *Almendarez-Torres v. United States* 523 U.S. 224 (1998) for the proposition that factors relevant only to sentencing are not elements of the offense.

Defendant's right to control defense. The most interesting issues in the case involve Soto's struggle to control his own defense, aired *ex parte* before trial. Given substantial evidence of Soto's guilt, trial counsel wanted to present extreme emotional disturbance (EED), and Soto wanted a pure innocence defense. A defense psychotherapist testified Soto "was not psychotic but had certain 'personality limitations' that prevented him from making wise choices." Nonetheless, the trial court found that Soto had voluntarily and intelligently waived his EED defense. *Jacobs v. Commonwealth*, Ky., 870 S.W.2d 412 (1994) (trial court erred by permitting insanity defense over defendant's objection). Basically, the Kentucky Supreme Court agrees. *See also Wake v. Barker*, Ky., 514 S.W.2d 692 (1974) (right to waive assistance of counsel and proceed pro se).

Instructing on EED would have violated right to control defense. On appeal, Soto claimed that despite his waiver of EED, the court erred by refusing a guilt phase instruction including EED as a negative element of murder, and an instruction on first degree manslaughter. Kentucky's high Court rules that given Soto's voluntary and intelligent waiver, instructing the jury on EED would have violated Soto's right to control his defense. Anyway, no evidence of uninterrupted EED from a triggering event had been presented.

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Allowing EED voir dire & argument for EED mitigation did not. Soto argued on appeal that the court erred by allowing counsel, over Soto's objection, to question jurors whether they could consider EED as a mitigating circumstance. Soto also argued that the court erred in denying his request to make his own closing arguments after the guilt phase, and by allowing counsel to argue EED mitigation over Soto's objection after the penalty phase.

But despite upholding Soto's right to control his defense, despite joining the "many jurisdictions" that uphold a defendant's right to waive presentation of mitigation evidence, and despite Soto's objections, the Court rules that it was no abuse of discretion to permit counsel to question prospective jurors regarding EED as a mitigating circumstance, to deny Soto the right to argue his own closing, and to permit counsel to argue EED as mitigation during the penalty phase.

Denying right to self-representation not structural error, because harmless. By the fact that Soto "never asserted his right to self-representation," the Court distinguishes the one case it finds that holds it was error to permit presentation of mitigation over the defendant's objection. *United States v. Davis*, 285 F.3d 381 (5th Cir. 2002). The Court confines *Jacobs* to situations in which the defendant is attempting to waive a guilt-phase defense inconsistent with innocence. During the penalty phase, reasons the Court, the issue of innocence has been resolved, and the only issue is degree of punishment.

The denial of a defendant's right to self-representation is a 6th Amendment "structural error" not subject to harmless error analysis. *McKaskle v. Wiggins*, 465 U.S. 168 (1984). To get around this little problem, the Court performs harmless error analysis up front and seizes on two facts 1) denying Soto the right to waive mitigation in the penalty phase did not increase the likelihood of a trial outcome unfavorable to Soto, and 2) the "death qualification" portion of voir dire requires the venire to hypothetically assume guilt, so no additional harm was done by asking if they could consider EED as mitigation. Justice Keller (with Stumbo joining) dissents on this issue.

No speedy trial error. Despite his requests for a speedy trial, there was almost a year between Soto's arrest on June 29, 1999, and his trial on June 20, 2000. However, by analyzing the four factors in *Barker v. Wingo*, 407 U.S. 514 (1972) the Court determines that Soto was not denied a speedy trial. Almost a year delay presents a "close" question of presumptive prejudice. However, when the remaining three *Barker* factors are examined, it is clear "no constitutional violation occurred…." There was no bad faith on the part of the Commonwealth, it was a complex case, there were forensic delays, a week of delay was due to the trial court's attendance at a training, and Soto did not point to any prejudice.

Soto's confession was voluntary. Though Soto was vomiting, and his blood contained high levels of PCP, cocaine, amphetamines, and antihistamines, the Court finds there was "no outward indication" he was intoxicated, and his confession was voluntary. The Court also finds and relies on the fact that he was not in custody, that the retired police officers he confessed to were not state actors, and that his invocation of silence was ambiguous.

Also addressed: excusing jurors for cause; right to be present regarding pretrial conference; hardship excusals; in-chambers voir dire; courtroom security; trial court role in sentencing; capital punishment verdict forms; cross-examination; concurrent/consecutive sentencing; penalty phase instructions; DD Form 214; authentication of form and phone call; relevancy; rule of completeness; proportionality review.

Endnotes:

1. *Smith v. Groose*, 205 F.3d 1045 (8th Cir. 2000); *Thompson v. Calderon*, 120 F.3d 1045 (9th Cir. 1997)(en banc) (*vacated on other grounds*, 523 U.S. 538 (1998); and *Drake v. Kemp*, 762 F.2d 1449 (11th Cir. 1985) (en banc) (Clark, J. specially concurring). ■

Statement of Dennis W. Archer, President, American Bar Association

Re: The decision by the U.S. Supreme Court in *Rumsfeld v. Hamdi*

June 28, 2004: The American Bar Association is pleased that the Supreme Court's decision in *Rumsfeld v. Hamdi* reaffirms a principle that has been a bedrock of our democracy: that U.S. citizens deprived of their liberty are entitled to contest the basis of their detentions in a court of law, and fundamental fairness requires access to counsel to assist them in that challenge.

As has been recognized by the Court since the nation's founding, secret determinations by the executive branch concerning the liberty of its citizens are fundamentally inconsistent with the core meaning of due process and the rule of law in a democratic society.

PLAIN VIEW . . .

by Ernie Lewis

Ernie Lewis, Public Advocate

Thornton v. United States
2004 WL 1144370, 2004 U.S. LEXIS 3681 (U.S. 2004)

This is an exceptionally important case about cars. It continues the 30-year deterioration of privacy rights surrounding the automobile. Twice before the Court had accepted a case to determine whether *New York v. Belton*, 453 U.S. 454 (1981) was confined to cases in which the police contacted the person they were arresting while he was still in the car, or whether it could be expanded to cases in which the person was already out of the automobile at the time of the arrest. Twice before the case was not decided on the merits. Finally, in *Thornton*, the Court has decided the substantive issue, and has done so by expanding the reach of *Belton*.

The case features a fact situation common for any criminal defense practitioner. Thornton was driving in Norfolk, Virginia. A police officer became suspicious of Thornton when Thornton slowed down, ostensibly to avoid driving next to the officer. The officer pulled behind Thornton, recorded his license number, and checked it out. The officer found that Thornton's license number was not registered to the car Thornton was driving. Thornton pulled into a parking lot, and got out of his car. The officer stopped his car, got out, and asked Thornton for his driver's license. Thornton was nervous, "rambling and licking his lips; he was sweating." The officer asked Thornton if he had drugs or weapons on him or in his car, and Thornton said no. The officer asked to pat Thornton down, and after Thornton agreed, the officer found a "bulge" in his left front pocket. The officer asked Thornton again about drugs, and Thornton admitted having drugs on him. A search revealed 3 bags of marijuana and a large bag of crack cocaine. Thornton was arrested and put into the police car in handcuffs; a search of Thornton's car resulted in a seizure of a .9-millimeter handgun.

Thornton was charged with possession with intent to distribute cocaine base, possession of a firearm by a convicted felon, and possession of a firearm in furtherance of a drug trafficking crime. A motion to suppress was denied. After a jury convicted him, Thornton received a 180 months' sentence in prison. Thornton's appeal to the 9th Circuit was denied. That Court held that "'the historical rationales for the search incident to arrest doctrine - "the need to disarm the suspect in order to take him into custody" and "the need to preserve evidence for later use at trial,"…did not require *Belton* to be limited solely to situations in which suspects were still in their vehicles when approached by the police." The Supreme Court granted *certiorari*, and in an opinion by Chief Justice Rehnquist, affirmed the 9th Circuit.

The Court reviewed their previous opinions primarily in *Chimel v. California*, 395 U.S. 752 (1969) and *Belton.* In *Chimel*, the person was arrested in his home. The Court held there that the search incident to a lawful arrest included the "person of the arrestee and the area immediately surrounding him." *Chimel* was used in *Belton*, a case where an officer pulled over a car for speeding, and arrested the occupants for possession of marijuana. The Court held in Belton that "'when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.'" The Court noted that in *Belton*, no reliance had been placed upon the fact that the person arrested was either in the car or out of the car at the time of the arrest. The Court reaffirmed that principle. "There is simply no basis to conclude that the span of the area generally within the arrestee's immediate control is determined by whether the arrestee exited the vehicle at the officer's direction, or whether the officer initiated contact with him while he remained in the car…In all relevant aspects, the arrest of a suspect who is next to a vehicle presents identical concerns regarding officer safety and the destruction of evidence as the arrest of one who is inside the vehicle."

The Court rejected the concern expressed that a person outside of a vehicle might not be able to gain access to either a weapon or contraband inside the car. They were more concerned, as they were in *Belton*, for a clear rule. "The need for a clear rule, readily understood by police officers and not depending on differing estimates of what items were or were not within reach of an arrestee at any particular moment, justifies the sort of generalization which *Belton* enunciated. Once an officer determines that there is probable cause to make an arrest, it is reasonable to allow officers to ensure their safety and to preserve evidence by searching the entire passenger compartment."

Justice O'Connor wrote an opinion "concurring in part." She wrote that she did not join in footnote 4. She wrote "to express my dissatisfaction with the state of the law in this area…[L]ower court decisions seem now to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception justified by the twin rationales of *Chimel*…That erosion is a direct consequence of *Belton's* shaky foundation."

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Justice Scalia also wrote an opinion concurring in the judgment, joined by Justice Ginsburg. In his opinion, the rationale underlying *Belton* is in need of change. He notes that there is no evidence of persons handcuffed in the back of a police car escaping and securing a weapon out of their car. He rejects the position that because a search could be conducted at the time of arrest, it makes little sense to not allow it once the person arrested has been handcuffed and placed in the police car. However, he strongly states that a search incident to an arrest is "not the Government's right; it is an exception—justified by necessity—to a rule that would otherwise render the search illegal." Finally, he notes that the *Belton* exception has virtually subsumed the rule. "As one judge has put it: "'[I]n our search for clarity, we have now abandoned our constitutional moorings and floated to a place where the law approves of purely exploratory searches of vehicles during which officers with no definite objective or reason for the search are allowed to rummage around in a car to see what they might find.'…I agree entirely with that assessment."

Justice Scalia proposes an alternative rationale for *Belton*. "I would therefore limit *Belton* searches to cases where it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." Applying that rationale to the facts of the case led Justice Scalia to join in the judgment. "[P]etitioner was lawfully arrested for a drug offense. It was reasonable for Officer Nichols to believe that further contraband or similar evidence relevant to the crime for which he had been arrested might be found in the vehicle from which he had just alighted and which was still within his vicinity at the time of arrest."

Justice Stevens wrote a dissenting opinion, joined by Justice Souter. In his opinion, the "bright-line rule crafted in *Belton* is not needed for cases in which the arrestee is first accosted when he is a pedestrian, because *Chimel* itself provides all the guidance that is necessary." He notes that the expansion of *Belton* in this case occurs without sufficient guidance for its application. "[W]e are not told how recent is recent, or how close is close…Without some limiting principle, I fear that today's decision will contribute to 'a massive broadening of the automobile exception…'"

Justice Stevens also reiterated his original opposition to allowing for a search of containers during a *Belton* search.

Black v. Commonwealth
2004 WL 1103587, 2004 Ky. App. LEXIS 139 (Ky. Ct. App. 2004)

This is a case about anonymous tips. A tip was made that "a black male, wearing a blue jean jacket and blue jeans, was riding a purple bicycle and selling narcotics across from a Speedway store located at the corner of Georgetown Street and Glenn Arvin" and that the "narcotics were inside a newspaper the black male was carrying." A Lexington Police Office investigated the tip, and saw Black fitting the description and carrying a newspaper. When the officer drove past him, Black looked at him. When the officer returned, Black was gone, but was soon located and pulled over. Black put the newspaper on the ground and a hand in his pocket. Black refused to take his hand out of his pocket, so the officer handcuffed him. During the melee, cocaine was dislodged from the newspaper. Black was arrested and charged with possession of cocaine. Black's motion to suppress was denied, and he entered a conditional guilty plea.

The Court of Appeals, in a decision written by Judge Taylor, reversed. The Court found that Black had been stopped when the officer blocked his bicycle with his car and Black was ordered to put the newspaper on the ground. This occurred before Black was ordered to take his hands out of his pockets, and before cocaine was found in the newspaper. At that moment, all the police had was the anonymous tip. Relying heavily upon *Florida v. J.L.*, 529 U.S. 266 (2000), the Court found the anonymous tip did not supply the required articulable suspicion sufficient for a *Terry* stop. "[T]he facts supplied by the anonymous tip could have been easily observed by any member of the general public. The tip merely described appellant's appearance and location. The tip failed to predict appellant's future behavior and, thus, failed to reveal an insider's knowledge of concealed criminal activity. Simply stated, it provided no information upon which police could corroborate its reliability and provided no basis for its allegation of criminal activity."

Judge VanMeter dissented. He would have found sufficient facts to constitute an articulable suspicion. "[T]he police also found the appellant in an area known for illegal drug sales and other crime, the officer who responded to the call recognized the appellant from previous encounters, and the appellant began to take evasive action upon observing the officer." Further, because the "drugs were discovered only as a result of the ensuing scuffle, as the newspaper in which they were being kicked around…the drugs, therefore are not the fruits of an illegal search or seizure, and should not be suppressed."

United States v. Couch
367 F.3d 557 (6th Cir. 2004)

The Kentucky Sate Police began investigating whether Roy Couch was trafficking in Oxycontin. They began making controlled buys from Fields, Napier, and Vernon Jelly. It was learned that Roy Couch was obtaining his Oxycontin from his uncle, Ronald Couch. When Roy was arrested, Jelly began getting his Oxycontin from Ronald. Jelly told KSP that he was getting his drugs from Ronald Couch. KSP sought a search warrant to search Couch's house, the execution of which resulted in the finding of drugs and weapons. Couch was indicted, lost a suppression motion, and eventually received 11 years in prison after a jury trial.

The Sixth Circuit affirmed Couch's conviction, including the rulings of the district judge. Judge Martin was joined by Judges Clay and Cudahy in the opinion. The Court held that the affidavit in support of the application for a search warrant was sufficient to demonstrate probable cause. "In this case, the information contained in the affidavit supporting the search warrant was not that of an 'uncorroborated tip of an unknown informant.'…The informant's identity, Jelly, was known to the officers and because Jelly was named in the affidavit, he could potentially be held accountable for providing false information. Jelly provided an account of Couch's criminal activities based upon his relationship and personal experience with Couch. Jelly's veracity was immediately evident in that the information he provided coincided with what the police had already learned from its investigation of Roy Couch. Thus, we conclude that the magistrate had a 'substantial basis for concluding that a search of [Couch's] home would uncover evidence of wrongdoing.'…and accordingly find Couch's first argument unpersuasive."

SHORT VIEW . . .

1. *State v. Golotta*, 837 A.2d 359 (N.J. 2003). An anonymous phone call to 911 from a driver using a cell phone describing erratic driving is sufficient under the Fourth Amendment to pull over the described car. The call described a blue pickup driving "all over the road…out of control…weaving back and forth" along with the license plate number. The Court distinguished *Florida v. J.L.*, 529 U.s. 266 (2000), where the Supreme Court had held that there was no firearm exception to the corroboration requirement of anonymous tips. The New Jersey Court stated that the instant case is the type of case "envisioned by the *J.L.* Court in which the investigatory stop is sustainable based on the content of the caller's tip and its urgent manner of transmission." The Court in particular looked at the fact that this was a 911 call which is more reliable than a typical anonymous phone call, that this involved a diminished expectation of privacy because it involved a car, and that it involved the dangerous situation of the drunk driver on a highway. The Court cautioned that not all 911 calls would constitute reasonable suspicion. Instead, the call must convey that there is "an unmistakable sense that the caller has witnessed an ongoing offense."
2. *United States v. James*, 353 F.3d 606 (8th Cir. 2003). A person who gives a computer disk to a third party and asks them to destroy it retains an expectation of privacy in the disk. The third party did not have apparent authority to consent to a search of the disk. This was a "mere act of storage…[O]ne does not cede dominion over an item to another just by putting him in possession."
3. *State v. Davolt*, 84 P.3d 456 (Ariz. 2004). The police may behave so badly that they will taint the state's inevitable discovery argument. Here, the police obtained evidence from a juvenile's hotel room in violation of both the Fourth and Fifth Amendments. The Court characterized the police misconduct as "extreme," including a violation of *Miranda*, after which a consent to search form was signed by the juvenile.
4. *State v. Branch*, 595 S.E.2d 437 (N.C. 2004). A car detained at a police roadblock may not be subject to a dog sniff unless there is reasonable and articulable suspicion. This case reflects growing interest in this issue, with varying results.
5. In *People v. Caballes*, 802 N.E.2d 202 (Ill. 2003), the Illinois Supreme Court similarly held that reasonable suspicion is required before a dog sniff of a car can occur during a routine traffic stop. In comparison, the South Dakota Supreme Court held in *State v. DeLaRose*, 657 N.W. 2d 683 (S.D. 2003) that briefly extending a routine traffic stop to allow for a dog to sniff a car does not require any further level of suspicion.
6. *State v. Kyles*, 675 N.W.2d 449 (Wis. 2004). The Wisconsin Supreme Court has declined the state's invitation to establish a *per se* rule that when a suspect refuses to keep his hands out of his pockets that justifies a *Terry* frisk. Further, the Court holds that an officer's subjective reason for making a traffic stop, while not dispositive under *Whren v. United States*, 517 U.S. 806 (1996), is a factor in the "rich tapestry" in the totality of the circumstances inquiry in determining the reasonableness of the stop and frisk.
7. *State v. Lovig*, 675 N.W.2d 557 (Iowa 2004). A police officer not in hot pursuit of a suspect may not make a warrantless arrest of a person inside the home using the argument that the BA would decline while a warrant is procured. The Court noted that the defendant would have had a right to decline the BAC test after the warrantless arrest, and that an expert could testify regarding the BA at the time of the execution of the warrant, thereby reducing any exigencies that might have existed.
8. *State v. Cuntapay*, 85 P.3d 634 (Haw. 2004). A short-term guest has a reasonable expectation of privacy in the home of the host guaranteed by the Hawaii Constitution. Here, the guest was playing cards in the garage when the police entered.
9. *State v. Brown*, 2004 WL 583837, 2004 Ark. LEXIS 168 (Ark. 2004). The Arkansas Supreme Court has held that the police must advise a person that they have a state constitutional right to refuse consent to search their house before the consent will be considered valid. As a result, a "knock and talk" search that found evidence of meth manufacturing was held to be unconstitutional. Washington has a similar state constitutional rule.
10. *People v. Rudy F.*, 12 Cal.Rptr.3d 483 (Cal. Ct. App. 2004). A person has an expectation of privacy throughout his or her home, irrespective of the rules of the family exclud-

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ing them from certain parts of the home. Here, the trial court had ruled that a child could not challenge the search of his legal guardian's bedroom. "While family members, particularly children, may have family rules that prohibit them from frequenting certain areas of their home, *i.e.* their parents' bedroom or bathroom, the formal living room, or the mother's good china closet, such rules are not for the government's benefit and do not justify intrusion into those areas. As against government intrusion, family members have an expectation of privacy in their entire home. It would be intrusive, unwise, and impractical to make expectation of privacy against government intrusion turn on the various family uses of different areas in the home."

11. *State v. Spencer,* 2004 WL 1171332, 2004 Conn. LEXIS 166 (Conn. 2004). A protective sweep of a home without a warrant may be made even though the arrest of the person is made just outside the home. The Connecticut Supreme Court holds that a protective search may take place in the immediate area of the arrest with no level of suspicion required; on the other hand, if as here the search is in an area close to but not immediately in the area of the arrest, an articulable suspicion is required that would "warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene."
12. *Jackson v. Commonwealth*, 594 S.E.2d 595 (Va. 2004). Anonymous tips are inherently unreliable, according to the Virginia Supreme Court. Here an anonymous tip stated that 3 African American men were "brandishing" a weapon, and that they were leaving in a white Honda. The police went to the place identified, and saw and stopped a white Honda, resulting in the discovery of evidence of drug and firearms violations. The Court held that the corroboration here was not sufficient to justify the stop, citing *Florida v. J.L.*, 529 U.S. 266 (2000). The Court found that the corroboration did little to buttress the reliability of the informant. "[E]ven when an informant reports the commission of an open and obvious crime, if the tip is truly anonymous and provides no explanation for how the informant acquired the information, *i.e.*, the informant's basis of knowledge, there remains a 'layer of inquiry respecting the reliability of the informant that cannot be pursued.'"
13. *Mann v. State*, 2004 WL 906720, 2004 Ark. LEXIS 276 (Ark. 2004). The police may not create an exigency, and then rely upon that exigency to avoid the warrant requirement. Here the police intercepted a package with meth in it, and then made a controlled delivery of the package, entering the home to find the defendant trying to destroy the evidence. Because the police created the exigent circumstances, they could not justify their warrantless entry of the home under the exigent circumstance exception. The Court noted that the police could have obtained an anticipatory warrant, or watched the house while they obtained a warrant.
14. *People v. Bowers*, 13 Cal.Rptr.3d 15 (Cal. Ct. App. 2004). In order to use the parole or probation condition allowing for a warrantless search, the police officer conducting the search must be aware of the condition at the time of the search.
15. *People v. Morquecho*, 806 N.E.2d 1281 (Ill. App. Ct. 2004). When an officer is conducting a *Terry* frisk, and feels an object that is "possibly narcotics," he may not seize the object under the "plain feel" exception. ■

DPA'S KENTUCKY INNOCENCE PROJECT

Selection Process for 2004 – 2005

The *Kentucky Innocence Project*, a unit of the Post Conviction Branch within the Post Trial Division of the Department of Public Advocacy, is starting the selection process for cases involving actual innocence to be assigned in the 2004 – 2005 academic school year. To be eligible for consideration, cases must meet the following criteria:

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- New evidence discovered since conviction or evidence that can be developed through investigation.

If you have had a case that satisfies all of the four criteria that you feel would be a good candidate for the selection process, please contact us at the address or phone number listed below. A *Kentucky Innocence Project* Information Packet will be sent to you requesting specific information about the case.

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GETTING THE BENEFIT OF PRIMACY: THE DEFENSE GOES FIRST DURING INDIVIDUAL *VOIR DIRE* IN DEATH PENALTY CASES

by Margaret F. Case

If there is one thing we have been taught about the art of persuasion, it is the principle of primacy and recency. People remember the first things presented to them and the last things presented to them.

Because we defense lawyers know the importance of primacy, we have been extremely frustrated over the years at the number of death penalty trials in which, during individual, sequestered *voir dire*, circuit judges have just automatically permitted the prosecution to begin the questioning of each individual juror, with the defense then being relegated to going second.

Under RCr 9.38, "(w)hen the Commonwealth seeks the death penalty, individual voir dire out of the presence of other prospective jurors is required if questions concerning capital punishment, race or pretrial publicity are propounded. Further, upon request, the Court shall permit the attorney for the defendant and the Commonwealth to conduct the examination on these issues."

Many prosecutors have argued that the prosecution is entitled to begin questioning with each individual juror because the prosecution "has the burden of proof." But, that is legally incorrect, because that principle deals, not with *voir dire*, but with proving the elements of the offense. Rather, during *voir dire*, when a juror is challenged for cause, the burden is on the challenging party to show that the juror lacks the necessary impartiality. "As with any other trial situation where an adversary wishes to exclude a juror because of bias, then, it is the adversary seeking exclusion who must demonstrate through questioning, that the potential juror lacks impartiality." *Wainwright v. Witt*, 469 U.S. 412, 423, 105 S.Ct. 844, 852, 83 L.Ed.2d 841, 851-852 (1985).

In some past trials, the defense has convinced the presiding judge to at least alternate between the prosecution and the defense, in terms of who begins questioning the individual jurors. And, that has been of great help to the defense.

However, in preparing for a recent trial in Kenton County, defense counsel went back to RCr 9.38 and looked at it with fresh eyes. The lawyer noted for the first time how the plain language of the rule actually states that, in cases where the prosecution seeks a death sentence, the defense goes first during the individual questioning of jurors. This can be seen from how the language of the rule differs when the rule relates to death penalty cases.

The basic text, relating to group *voir dire* in all cases, reads:

> The court may permit the attorney for the Commonwealth and the defendant or the defendant's attorney to conduct the examination of prospective jurors . . .," (emphasis supplied).

So, in a non-death case, where the entire *voir dire* is done with all the potential jurors in a group, the prosecutor normally begins the questioning.

But, language which was added later to RCr 9.38, (concerning individual, sequestered *voir dire* on death penalty views, race issues, and pre-trial publicity in a death penalty case), reads as follows:

> When the Commonwealth seeks the death penalty, individual voir dire out of the presence of other prospective jurors is required if questions regarding capital punishment, race or pretrial publicity are propounded. Further, upon request, the Court shall permit the attorney for the defendant and the Commonwealth to conduct the examination on these issues." (Emphasis supplied.)

Obviously, then, the normal order of proceeding is reversed during individual *voir dire* in a death penalty case. This is similar to the way in which the normal order of closing arguments is reversed in a death penalty sentencing proceeding under KRS 532.025 (1)(a).

When this language in the Rule was pointed out to the judge and prosecution during a pre-trial hearing in that recent Kenton County case, the prosecution did not have any counter-argument. At trial, the defense began the questioning of each individual juror. ■

National Committee on the Right to Counsel to Examine System of Legal Representation for People Who Cannot Afford It: Bipartisan Committee to Explore Ways to Provide Meaningful, Effective Counsel

Washington, D.C., Tuesday, June 22, 2004: A new committee launched today will examine the ability of the American criminal justice system to provide adequate counsel to criminal defendants who cannot afford lawyers. The National Committee on the Right to Counsel includes members who have experience as judges, prosecutors, lawyers, law enforcers and policymakers and will assess the various ways that states and localities provide legal representation to criminal defendants. The committee will also provide recommendations on how to improve the system to ensure fairness for all Americans. Former Vice President Walter Mondale will serve as the honorary chair.

More than 40 years after the United States Supreme Court ruling in Gideon v. Wainwright, that established the right to lawyers for poor people in criminal cases, there are still defendants today who have not been provided competent counsel – or they have no legal representation at all. The Constitution Project and the National Legal Aid and Defender Association (NLADA) established this bipartisan committee to address the contemporary application of the U.S. Supreme Court's 1963 ruling.

"We can play a significant role in addressing the issues that affect quality representation in our country," says the Honorable Timothy K. Lewis, committee co-chair and former judge for the United States Court of Appeals for the Third Circuit. "It's time that all of us – judges, legislators, law enforcement, policymakers and academics – raise the level of consciousness on the right to counsel issue. The cross section of professional backgrounds and interests represented in this committee is a good place to start."

Even though state and local governments are responsible for ensuring adequate counsel for defendants who cannot afford to hire their own lawyers, many people throughout the country are nonetheless still convicted and imprisoned each year without any legal representation, or with lawyers who have hundreds of other cases, no expertise in criminal law, or no funds to investigate facts or get DNA testing. Some people who cannot afford an attorney sit in jail for weeks or months before being assigned an attorney; others do not meet or speak with their lawyers until the day of a court appearance.

"In some instances across the country, courts have upheld convictions even when the defendants were represented by lawyers who slept through portions of the trial or were drunk or under the influence of drugs," says the Honorable Rhoda Billings, committee co-chair and former Chief Justice of the North Carolina Supreme Court. "That level of performance is not what the constitutional right to counsel means. Whether counsel is state-appointed or privately retained, we expect fairness in our American criminal justice system."

The committee is made up of people with a diversity of viewpoints and experience at the highest levels of every part of our justice system: police, prosecution, defense, judicial, victims, law schools, bar associations and state and federal government. One member participated as a Florida state prosecutor opposing Clarence Gideon's request for counsel in the 1963 case before the U.S. Supreme Court. The committee's youngest member, who recently graduated from law school, successfully proved the innocence of Anthony Porter, who came within 48 hours of being executed in Illinois.

"Prosecutors want capable defense attorneys in prosecutions to help prevent the unintentional conviction of an innocent person. Every conviction of an innocent person leaves the guilty person free to endanger our community," says the Honorable Robert Johnson, District Attorney for Anoka County, Minn. and committee co-chair.

The Committee will be conducting its own research, as well as studying the conclusions of legal groups, such as NLADA, the American Bar Association, and the National Association of Criminal Defense Lawyers, which have identified several problems facing public defense, including: no counsel, excessive caseloads, a lack of enforceable standards of quality for competent counsel, underfunding, and a lack of independence.

Many jurisdictions across the country have made major strides in providing meaningful representation to those who cannot afford it. The committee will examine these experiences to develop practical recommendations for others to improve their representation system. ■

IT'S TIME TO GET SMART ON CRIME

By Dennis W. Archer, President
American Bar Association

After spending billions of dollars locking up more and more people for a broader range of crimes and longer periods of time than ever before, many of the states that pioneered our nation's "tough on crime" movement are looking for alternatives. Why? Because the old way has cost too much and done too little to make our communities safer. In short, they realize that it isn't enough just to be tough on crime; they also need to be smart on crime.

It's not enough to lock people up and throw away the key. To really make our communities safer, we also need to look at the other side of the coin: what happens after sentencing.

Roughly 95 percent of the 2.1 million Americans in prison today will eventually get out. If we invest resources while they are incarcerated in helping them prepare to reenter society-providing job training and treatment for substance abuse, for example-we make our communities safer by reducing the chance that ex-prisoners will return to a life of crime. Because we don't do enough of this today, about one-third of the people released from prison commit new crimes and eventually go back.

It's in all of our interests, both in terms of economics and community safety, to help them stay away from crime.

We also need to remove unnecessary legal barriers that prevent released inmates from becoming productive members of society. Right now, the deck is permanently stacked against many of them by an invisible web of state and federal laws that blocks their path to redemption.

Take, for example, a college student convicted of felony marijuana possession, or a young cocaine addict convicted of stealing to feed his addiction. After they complete their sentences, federal law permanently bars them from receiving federal student loans, public housing or public assistance. For too many, additional sanctions like these act as a permanent barrier on the road away from their pasts. State legislatures and the U.S. Congress need to remove those so-called collateral sanctions that unnecessarily prevent people from getting their feet on the ground.

Congress also needs to do away with mandatory minimum sentences, which too often are tough on the wrong people. While we all can agree that similar crimes should generally result in similar sentences, the idea that Congress can dictate a one-size-fits-all sentencing scheme does not make sense. Judges need to have the discretion to weigh the specifics of the cases before them and determine an appropriate sentence. There is a reason we give judges a gavel, not a rubber stamp.

Most troubling, however, is the fact that minorities are hit hardest by these and other problems in our justice system. More than 60 percent of the people behind bars in America are people of color. Statistically, African American males born today have a 1 in 3 chance of being incarcerated sometime during his lifetime, compared to a 1 in 6 chance for Latino males and a 1 in 17 chance for white males. We cannot ignore this disparity. It needs to be addressed.

Let me be clear about one thing. These are not your typical criminal-coddling recommendations from out of touch advocacy groups. They are the product of hardheaded, realistic assessment of the problems in our criminal justice system. Put simply, our current approach to crime and punishment is not working: it locks up too many of the wrong people, has a disproportionate impact on minorities, and fails to make our communities safer because it poorly prepares prisoners to reenter society upon release.

The need for reform is clear. We've spent more than 20 years getting tougher on crime. Now we need to get smarter. ■

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Rosie Flanagan
NCDC, c/o Mercer Law School
Macon, Georgia 31207
Tel: (912) 746-4151
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Thoughts to Contemplate

Do not judge, and you will never be mistaken.

–Rousseau

The teacher - if he is wise - does not bid you to enter the house of his wisdom - but leads you to the threshold of your own mind.

— Kahlil Gibran

You cannot teach a man anything You can only help him discover it within himself.

— Unknown author

Imagination is more important than knowledge.

— Albert Einstein